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Criminal Division
Asset Forfeiture and Money Laundering Section

Asset Forfeiture News

A Central Source for Federal Forfeiture Information

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1997: A Year of Change at INS

By Office of Asset Forfeiture, Immigration and Naturalization Service

Prior to last year, the Immigration and Naturalization Service's (INS's) ability to use asset forfeiture was limited to illegal immigrant interdiction efforts. The forfeiture provisions of the Immigration and Nationality Act, as amended in 1978 (8 U.S.C. § 1324(b)), permit the seizure and forfeiture of conveyances used for the smuggling of aliens into or within the United States. The use of forfeiture as a law enforcement tool by INS was understandably, therefore, generally confined to areas at or near the United States borders where most interdiction efforts occur, and invariably involved the seizure of cars or trucks being used to smuggle immigrants into the country. Last year INS received expanded forfeiture authority and its potential use of forfeiture as an enforcement tool dramatically changed.

In April of 1996, the President signed the Antiterrorism and Effective Death Penalty Act that made alien smuggling and some passport and visa offenses predicate acts for criminal racketeering purposes under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Five months later, the President signed the Illegal Immigration Reform and Immigrant Responsibility Act, which added additional immigration law violations to the growing list of RICO predicates. The new immigration law also amended the criminal forfeiture statute, 18 U.S.C. § 982(a)(6), to permit the forfeiture of proceeds obtained from certain passport and visa fraud offenses. These changes not only increase the prosecutive tools available to INS and federal prosecutors through RICO and provide for direct forfeiture of proceeds in passport and visa fraud cases, but through incorporation, make money laundering charges and associated forfeitures, both civil and criminal, available as well. In addition, in December of 1996, the Attorney General approved changes to the federal regulations governing remission and mitigation of forfeitures, which superseded the regulations that governed remission of forfeitures brought under the Immigration and Naturalization Act.

To ensure that this expanded forfeiture authority is used effectively and aggressively as a law enforcement tool in every investigation where applicable, the

*See **Year of Change**, page 2*

Other Top Features

A Year of Change at INS

Year of Change, from page 1

offices of the Associate Commissioners for Programs and Field Operations, have established a special initiative that will be managed and supervised by the Asset Forfeiture Office (AFO) within the Office of Programs at INS Headquarters. The goal of this initiative is to provide appropriate training, program direction and oversight, individual case direction, and other forms of assistance that may be needed on a case-by-case basis to facilitate a field-wide focus on the use of asset forfeiture in all alien smuggling and immigration and visa fraud investigations.

The AFO and the Eastern Regional Office have sponsored two training conferences that explain the new authority permitting forfeiture and teach financial investigative methods and techniques. . . .

As a part of this initiative, the AFO and the Eastern Regional Office have sponsored two training conferences that explain the new authority permitting forfeiture and teach financial investigative methods and techniques used to identify assets subject to forfeiture. Additional training is being scheduled. In conjunction with regional and divisional offices within INS, the AFO has also identified major on-going investigations for the purpose of assessing forfeiture potential in those cases, and provided on-site direction to maximize the use of asset forfeiture and prevent organized alien smugglers and others from profiting from their trafficking in human cargo. Additional cases are being identified weekly as more offices consider the use of forfeiture as an enforcement tool now finally available to INS in a way it has never been before. Once these cases are identified, the INS will select those that will be monitored and receive additional assistance and analytical resources.

According to current agency estimates, there are approximately 5 million undocumented aliens living in the United States and the number is growing by over a quarter of a million per year. INS investigations indicate that organized alien smuggling, the trafficking in human cargo with all of its attendant implications, will become a multibillion dollar, illegal industry that reportedly rivals drug smuggling in size, sophistication, and subterfuge. For example, 173 Central Americans enroute to the United States were recently discovered by Mexican authorities packed into a tractor trailer among crates of detergent where they had been hidden for three days without food. The immigrants had collectively paid over half a million dollars in order to be smuggled into the United States. Often smugglers continue to extract payment from the hapless immigrants long after they have arrived in the United States. Extortionate payments are made under the threat of being exposed and deported.

Organized alien smuggling . . . will become a multibillion dollar, illegal industry. . . .

Alien smuggling and immigration fraud are integrally and inextricably connected to other types of major crime, such as illegal drug trafficking, arms dealing, and international terrorism. It is common for illegal migrants—forced to work for extended periods in intolerable conditions for less than a viable wage—to become prostitutes, drug smugglers, and engage in other types of criminal activity, under the direction and complete control of the smuggler or facilitator who benefits financially from such activity. The INS intends to use the expanded forfeiture authority given by the Congress to help the dismantlement of alien smuggling and document-vending organizations, and to take the illegal profit from those who violate our international borders to traffic in such human suffering.

Forfeitures Under the Internal Revenue Code

By Richard Delmar, Office of Assistant Chief Counsel (Criminal Tax), Internal Revenue Service

The Internal Revenue Service (IRS) has the authority to conduct civil forfeitures under both 18 U.S.C. § 981(a)(1)(A) and the Internal Revenue Code, Title 26 of the United States Code. Title 26 forfeitures are different from the civil forfeiture provisions in Titles 18 and 21 in terms of the government's burden of proof, processing procedures, and review and authorization requirements.

What can be forfeited

The following items can be forfeited under *I.R.C. § 7301*:

(a) taxable property
- property on which a tax is imposed, possessed, or controlled;
- for the purpose of sale or removal in fraud of the internal revenue laws;
- with design to avoid payment of a tax; or
- removed, deposited, or concealed, with the intent to defraud the United States of a tax.

(b) raw materials
- property possessed with the intent to manufacture into taxable property;
- to be sold in fraud of the internal revenue laws; or
- to evade payment of a tax.

(c) equipment
- property located in a place where taxable property or raw materials are found;
- intended for use in making taxable property; or
- with the intent to defraud the United States of a tax.

(d) packages
- property used currently or in the past; or
- as a container for taxable property or raw materials.

(e) conveyances
- property (*e.g.* planes, boats, automobiles) used to transport, hold, or conceal; or
- taxable property, raw materials, equipment, or packages.

Under *I.R.C. § 7302*, the following items can be forfeited:

- personal property used or intended for use to violate an internal revenue law or regulation; or
- property, to be forfeitable under section 7302, must be an active aid in the violation.

Uses of I.R.C. §§ 7301 and 7302

Traditionally, the code forfeiture provisions were used to take property involved in bootlegging and wagering schemes when taxes on those activities were evaded. In the bootlegging context, examples include the moonshine, the sugar and other ingredients, the still and other equipment, and the trucks used as transport. In gambling schemes involving evasion of

*See **Forfeitures**, page 4*

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Articles in the *Asset Forfeiture News* are intended to assist federal prosecutors and agents in enforcing the forfeiture laws by providing guidance, information, and references. Unless otherwise stated, they represent the views of the individual authors, and not necessarily the Department of Justice. Nothing contained herein creates or confers any rights, privileges, or benefits for or on any claimant, defendant, or petitioner. *United States v. Caceres*, 440 U.S. 741 (1979).

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Forfeitures Under Internal Revenue Code

Forfeitures, from page 3

the excise tax on wagers, I.R.C. § 4401, office equipment, cars, and cash involved in the schemes can be forfeited. *See, e.g., Nocita v. United States*, 258 F.2d 199 (9th Cir. 1958), *Bullock v. United States*, 384 F.2d 747 (5th Cir. 1967), and *United States v. $8,674*, 379 F.2d 946 (7th Cir. 1967), *vacated on other grounds* 390 U.S. 204, *on remand*, 393 F.2d 499, *aff'd* 491 U.S. 715 (1971).

In recent years, the traditional uses of code forfeitures have been expanded to meet new schemes designed to violate the internal revenue laws.

The scope of code forfeitures has expanded to include other types of property used or intended for use in violating internal revenue laws or regulations. In *United States v. One 1954 Rolls Royce Silver Dawn*, 777 F.2d 1358 (9th Cir. 1985), a car which was the object of a fraudulent tax shelter promotion was forfeited as an active aid in the scheme to evade taxes.

In recent years, the traditional uses of code forfeitures have been expanded to meet new schemes designed to violate the internal revenue laws. For example, in refund fraud schemes, the computers and other office equipment, cars, cash, and bank accounts used to advance the schemes have been forfeited. In motor fuel excise tax evasion schemes, the fuel, tankers, cash, and bank accounts used in the schemes have been forfeited.

Practice

Burden of Proof. The government's burden in obtaining seizure warrants is probable cause, reasonable ground for a belief that the property is subject to forfeiture, and less than prima facie proof, but more than mere suspicion. In the actual forfeiture action, the burden is preponderance of evidence; more likely than not.

Administrative Process. If the value of the property to be forfeited is $100,000 or less, I.R.C. § 7325 allows initiation of administrative forfeiture proceedings. There must be an appraisal by three persons and the forfeiture must be advertised for three weeks. A claim and cost bond may be filed within 30 days of the first advertisement, in the amount of $2,500: this converts the matter to an *in rem* civil judicial proceeding in District Court. The procedures for considering petitions for remission or mitigation of administrative code forfeitures, pursuant to I.R.C. § 7327, incorporate the Customs law—19 U.S.C. § 1618.

Role of IRS Counsel. The IRS Counsel provides pre-seizure advice to Criminal Investigation Division agents regarding legal sufficiency of the proposed forfeiture, seeks coordination with any related criminal case, and assists in perfecting probable cause for the warrant application. After seizure, Counsel writes a law and fact memo: post-seizure advice to the District Director on the proposed forfeiture's legal sufficiency and the procedures necessary to perfect forfeiture.

In non-traditional uses of Title 26 forfeitures *(e.g.*, in refund fraud and motor fuel cases), Counsel attorneys must contact the Office of Assistant Chief Counsel (Criminal Tax) for a policy review of their draft law and fact memo, in order to assure that the forfeiture is not being used for a purpose inconsistent with IRS policy.

The consequences of failure to get Counsel and Tax Division authorization for Title 26 forfeitures can include dismissal of the government's complaint and imposition of EAJA fees.

Judicial Forfeiture Process. If the property's value exceeds $100,000, or if a claim and cost bond is filed, then the forfeiture must be done judicially. Because forfeitures pursuant to the Internal Revenue Code involve return information within the meaning of

26 U.S.C. § 6103(b)(2), judicial action by the Department of Justice can occur only if a referral is in effect.

According to I.R.C. § 7401, the Department of Justice cannot commence a Title 26 civil forfeiture without authorization from the Secretary of the Treasury. Per 26 C.F.R. § 403.26(b), and internal delegations, IRS Assistant Chief Counsel (Criminal Tax), and certain Counsel officials in the field, are the referral authorities for such forfeitures. Per 28 C.F.R. § 0.70(a), the Tax Division, Department of Justice, must review and approve all Code judicial forfeitures before they are commenced by U.S. Attorneys. Thus, Counsel's referral, once it gets Criminal Tax Division policy approval, must be to the Tax Division, and not directly to the U.S. Attorney.

The consequences of failure to get Counsel and Tax Division authorization for Title 26 forfeitures can include dismissal of the government's complaint and imposition of EAJA fees. *See, e.g., United States v. 87 Skyline Terrace*, 26 F.3d 923 (9th Cir. 1994).

Counsel attorneys in the district and regional offices, as well as in the Office of Assistant Chief Counsel (Criminal Tax), are available to provide guidance on code forfeitures.

AFBB is Available in a Windows Environment

By Morenike Soremekum, Aspen Systems

The Asset Forfeiture and Money Laundering Section (AFMLS) has completed Phase II of the Asset Forfeiture Bulletin Board (AFBB) upgrade. The AFBB is now available in a Windows-based environment, making it easier for you to peruse the AFBB.

In order to access the new system efficiently, we recommend that you have the following equipment:

- 486 or faster computer processor;
- 28.8 baud modem;
- Windows 3.1, Windows 95, or Windows NT software; and
- Telecommunications software, such as *ProComm Plus for Windows®*.

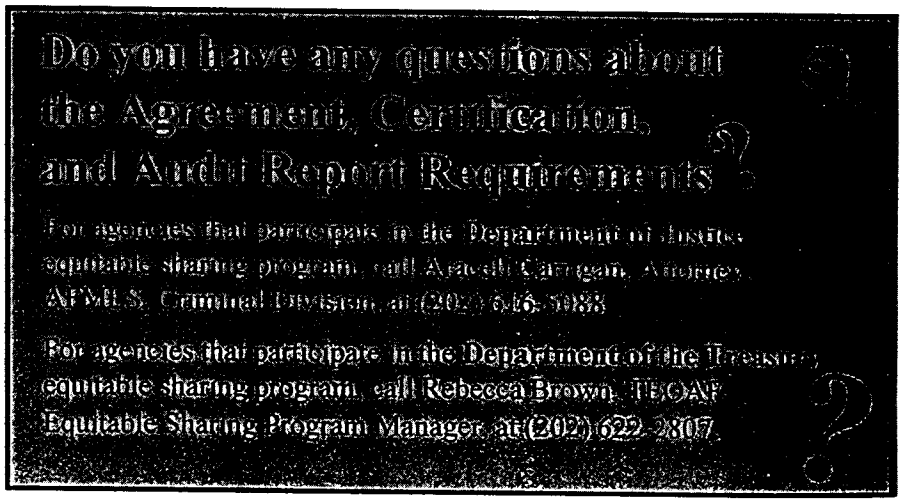
✍ *Note*: If you work at a U.S. Attorney's Office, you may not need to have this equipment to access the AFBB. Contact your System Manager for details, or if you prefer, call Ms. Soremekun, the AFBB System Operator, at (202) 307-0265.

All potential AFBB users will be required to download software, install it on their computers, and fill out an on-line questionnaire for verification purposes prior to logging on to the AFBB. AFMLS is presently writing a guide that will provide you with step-by-step instructions about accessing and navigating the AFBB.

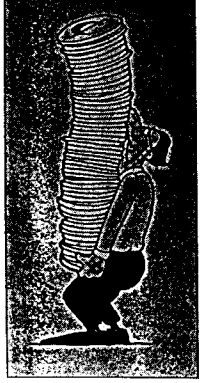
Ms. Soremekun, the AFBB System Operator, will be happy to give you details about how you can become an AFBB user. Please call her at (202) 307-0265, or send Department of Justice e-mail to CRM07(SOREMEK).

Highlights about Phase II of the AFBB upgrade will appear in future issues of the *Asset Forfeiture News*. To find the latest news about AFBB developments, access the AFBB or EOUSA BBS.

We hope that you enjoy the new AFBB!



Treasury Trends



by Charles Ott, Special Projects Advisor, Executive Office for Asset Forfeiture, Department of the Treasury

Fort Myers Property Approved for Weed and Seed Transfer

On February 13, 1997, Treasury's Executive Office for Asset Forfeiture approved a recommendation made by the Criminal Investigation Division of the Internal Revenue Service (IRS/CID) that seized real property in Fort Myers, Florida, be transferred, upon forfeiture, to that city's Community Redevelopment Agency (CRA) under the Weed and Seed Program. The property which had a prior existence as a lounge and nightclub had been seized just over two years ago for having been purchased with structured proceeds from narcotics trafficking.

The Fort Myers CRA manages block grants from the Department of Housing and Urban Development to provide new low income housing, promote economic development, and provide assorted resources to help individuals move off public assistance rolls. The CRA intends to use the property to offer a Family Self-Sufficiency Resource Center which would offer educational programs, child care facilities, and life skills training for neighborhood residents.

This transfer has received the endorsement of the United States Attorney for the Middle District of Florida, who noted the suitability of the property's location to promote the overall Weed and Seed goal of securing at risk areas and stabilizing them for the future through investments in social and economic development.

Secret Service Case Yields High Value Asset Sharing

A Secret Service proposal to share forty percent of a $1.1 million asset deposited in the Treasury Forfeiture Fund with the United States Postal Inspection Service was recently approved by the Office of the Under Secretary of the Treasury for Enforcement. This sharing stems from a settlement in a case out of Charlotte, North Carolina, involving the nation's largest airline caterer, Dobbs International Services, Inc.

Catering companies such as Dobbs, which operate at airports, are commonly charged port fees by airport authorities and these fees are routinely passed on to the airlines the company serves. In 1984, Dobbs entered into a new agreement with the Charlotte airport authority which eliminated the required port fee. The government's case maintained that Dobbs continued passing on the costs of these fees to its airline customers long after their elimination and laundered the monies fraudulently collected in its business operations.

Last November, Dobbs agreed to a settlement to avoid what the company projected would have been protracted and costly legal proceedings. Under the agreement, victimized airlines were to receive just under $6 million from Dobbs with payment of over a million more dollars into the Treasury Forfeiture Fund. The Postal Inspection Service was brought into the case over two and a half years ago and worked closely with Secret Service investigators in uncovering, developing and organizing substantial amounts of evidence.

Observe Program Changes in Treasury's Revised *Equitable Sharing Guide*

By Charles Ott, Special Projects Advisor, Executive Office for Asset Forfeiture, Department of the Treasury

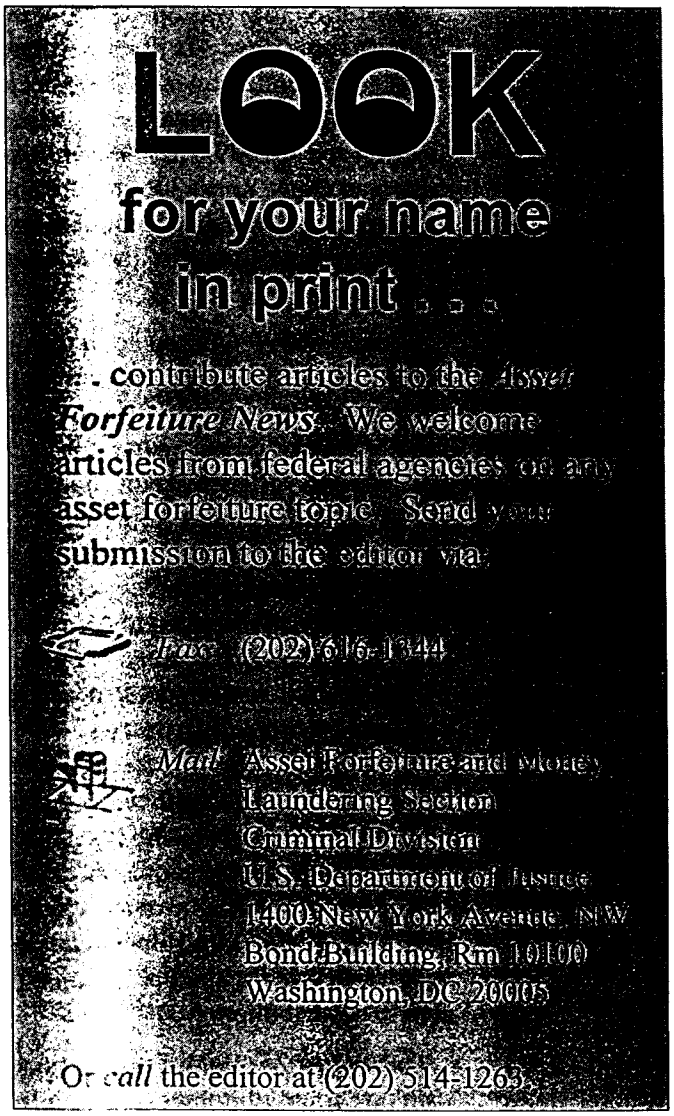
The first revised edition of the Department of the Treasury's *Equitable Sharing Guide*, popularly known as the Green Book, was widely distributed in early March by the Treasury's Executive Office for Asset Forfeiture (EOAF). Originally published in 1993, this new edition contains some important program changes involving the following areas:

- **Salaries**—equitable shares can now be used to pay the salaries of sworn law enforcement officers hired to replace other officers assigned to *federal* task forces as well as some officers assigned to non-traditional positions in approved specialized programs;
- **Federal Equitable Sharing Agreements**—now only need to be filed every three years with the Department of the Treasury;
- **Annual Certification Report**—lists the equitable sharing monies and properties received from either the Departments of Justice or the Treasury during the recipient agency's fiscal year and must be submitted within sixty days following the close of that fiscal year; and,
- **Annual Audit**—is required when the recipient agency receives or maintains a federal forfeiture fund account balance of **more than $100,000 in a single fiscal year** and needs to be submitted within **180 days** following the close of the **recipient's** fiscal year.

The revised guide also emphasizes a significant difference between Department of the Treasury and Department of Justice policy on the pass-through of equitably shared monies, namely, that **the Department of the Treasury does not allow the pass-through of cash** to non-law enforcement governmental agencies except in windfall situations.

The initial distribution of the revised sharing guide was made to all Treasury enforcement bureau offices, Law Enforcement Coordinating Committee chairs, and asset forfeiture units in United States Attorneys' Offices, as well as state and local law enforcement agencies that have participated in the equitable sharing program of the Treasury Forfeiture Fund.

Additional copies of the revised guide may be obtained from Treasury EOAF, 740 15th Street, NW, Suite 700, Washington, DC 20220. The telephone number is (202) 622-9600. Any questions regarding the policies represented in the guide should be referred directly to Treasury EOAF.



Equitable Sharing

By Irene Gutierrez, Trial Attorney, AFMLS, Criminal Division, and Terrence Sweeney, Dyncorp Government Services

Weed and Seed Transfer of 3839 Mt. Pleasant Road Provides Recovering Teens with a Rural Retreat Site

WD/New York—In April of 1994, the Pennsylvania Attorney General's Office, the Bureau of Narcotics Investigations and the New York State Southern Tier Regional Drug Task Force began a joint investigation into a large marijuana distribution organization that was operating in the Erie, Pennsylvania area. As the investigation progressed, undercover officers became associated with Carmen Farbo, who owned and resided at 3839 Mt. Pleasant Road, Sherman, New York. During the course of the investigation, Farbo supplied large amounts of marijuana to the undercover officers.

In June of 1994, based upon the quantities of marijuana that Farbo had sold to the undercover officers, a New York State search warrant was executed for Farbo's house at 3839 Mt. Pleasant Road. Agents of the Drug Enforcement Administration (DEA) and the Southern Tier Regional Drug Task Force searched the house pursuant to the warrant and discovered 41 growing marijuana plants, 3.5 pounds of processed marijuana that was bagged and ready for sale, and assorted drug related paraphernalia. After his arrest, Farbo informed investigators that since December of 1993, he had been using his home as a delivery point for large quantities of marijuana. The drugs would be unloaded at the 3839 Mt. Pleasant Road address, and then transported to the Erie, Pennsylvania area for distribution.

On August 25, 1994, Farbo was charged with one count of Possession with Intent to Distribute Marijuana, two counts of Corrupt Organization, and two counts of Delivering Marijuana, all of which are felonies under Pennsylvania State Law. On December 2, 1994, Farbo pleaded guilty to the charges. 3839 Mt. Pleasant Road was forfeited pursuant to 21 U.S.C. § 881 on November 17, 1995.

The Foundation represented the best possible use for the land and was an important step in fighting drug addiction among the area's young people.

The Alcohol and Drug Dependency Services Foundation, Inc. (hereinafter referred to as the Foundation) contacted the U.S. Attorney's Office to inquire about the availability of land in the area. The Foundation is well-known in Western New York for providing excellent service to children fighting drug abuse. It operates two facilities which serve the needs of adolescents dependent on drugs or alcohol, Renaissance House, a residential drug treatment facility for youth, and Stepping Stones, an after-care facility designed to support recovering teenagers who are homeless or come from non-supportive families. Assistant U.S. Attorney Richard Kaufman informed the Foundation of the ongoing forfeiture action on the Mount Pleasant Road property. Recognizing the potential of the forfeited property, which consists of 23 acres of heavily wooded land containing a house and pond, the Foundation sought to use the property as a rural retreat site for the residents of Renaissance House and Stepping Stones. During the retreats, the teenagers would participate in activities like hiking and fishing, as well as traditional therapeutic programs like meditation, group

cooperation, and trust building activities. In addition, the Foundation planned to use the facility as an education center for at-risk Chautauqua County teens, a site for staff retreats, and workshops for parents and significant others of recovering teens.

The United States Attorney for the Western District of New York, Patrick NeMoyer, believed the transfer to the Foundation represented the best possible use for the land and was an important step in fighting drug addiction among the area's young people. Thus, he recommended the transfer pursuant to the Department of Justice's Weed and Seed Initiative. The transfer was approved on March 12, 1997.

DEA/Houston Police Department Teamwork Snares Money Launderer

SD/Texas—From June 1993 to January 1994, the Houston Police Department (HPD) and the Drug Enforcement Administration (DEA) conducted a joint investigation of a Colombian drug trafficking and money laundering operation. On January 5, 1994, DEA agents received information that an individual would try to smuggle a large amount of drug proceeds through Houston into New York. HPD officers were advised that DEA Group 2 was conducting surveillance on the suspect and the agents requested that the officers assist them if the suspect attempted to depart Houston Intercontinental Airport (IAH) on a commercial flight.

DEA did not want to alert the suspect or other members of the organization that an active surveillance operation was being conducted. . . .

The agents followed two men to IAH and watched them climb out of a Doubletree Hotel shuttle van with four obviously heavy pieces of luggage. One suspect, later identified as Charles Bruno, filled out Continental Airlines baggage identification tags in the name of "Spence," and with the address of "Bayside, N.Y." When Bruno tried to check all four pieces of luggage, he was told that only three pieces are permitted for each traveller. He then checked three suitcases on a flight to New York's LaGuardia Airport. The second suspect, later identified as "Schwartz," returned to the Doubletree Hotel with the fourth suitcase. DEA maintained surveillance.

DEA did not want to alert the suspect or other members of the organization that an active surveillance operation was being conducted, so DEA and HPD decided to make it appear that the search of the luggage would result from an alert by a drug sniffing dog pursuant to a profile stop. An HPD officer proceeded to the Continental Airlines baggage area and directed an HPD Narcotics detection dog handler to check all outbound baggage headed to LaGuardia. The dog alerted the HPD officer to the three suitcases checked by Bruno, indicating the presence of an odor of controlled substances within the case. The three suitcases were secured by the HPD officer while other HPD officers and DEA agents boarded the flight to LaGuardia and detained Bruno.

Bruno consented to the search of the three suitcases and stated that each suitcase contained cash, which he was hired to pick up from Houston and take to New York. The total amount of currency contained in the suitcases was $1,053,200. The funds were seized by DEA and, pursuant to 21 U.S.C. § 881, administratively forfeited on October 14, 1995. On January 6, 1997, the Acting Assistant Attorney General for the Criminal Division approved equitable sharing of the funds between the HPD and the Assets Forfeiture Fund.

Reinventing EquiShare

By Nancy L. Rider, Deputy Chief, AFMLS, Criminal Division

The Asset Forfeiture and Money Laundering Section (AFMLS) will launch new procedures for processing Department of Justice equitable sharing requests beginning *May 31, 1997*. For some time now, we have been discussing with representatives of the Asset Forfeiture Management Staff, Federal Bureau of Investigation, Drug Enforcement Administration, Executive Office for U.S. Attorneys, and U.S. Marshals Service ways to speed up the equitable sharing process. Now that the Consolidated Asset Tracking System (CATS) has been installed throughout much of the country, we have reached a point where we can begin to speed up the sharing process by reducing the equitable sharing paper flow in judicial forfeitures.

Through the CATS program, Department of Justice forfeiture components track information on one system and determine the status of an asset from the moment of seizure until disposal. Prior to the development of CATS, AFMLS was the sole repository of sharing recommendations and decisions, which it tracked on its CATS system. Thus, equitable sharing paperwork is passed through AFMLS at each stage of the process. Under CATS program, this is no longer necessary because the paperwork will move directly from one component to another in the review process. AFMLS plans to implement the procedures described below in two stages beginning *May 31, 1997.*

Phase I—May 31, 1997

With respect to all judicial forfeitures, the seizing agency headquarters should send their sharing recommendations directly to the U.S. Attorney's Office for: 1) a decision in forfeitures that involve less than $1 million or 2) a recommendation in forfeitures that involve $1 million or more or the transfer of real property. As of May 31, 1997, sharing packages should no longer be sent from seizing agency headquarters to AFMLS for forwarding to the U.S. Attorneys' Offices.

As of May 31, 1997, sharing packages should no longer be sent from seizing agency headquarters to AFMLS for forwarding to the U.S. Attorneys' Offices.

During Phase I, the U.S. Attorneys' Offices should continue to send the sharing packages with their decisions or recommendations, as the case may be, to AFMLS, which will then forward the completed packages to the U.S. Marshals Service for payment.

Phase II—Evaluation

After a trial period of about two months, AFMLS will evaluate the progress made under Phase I. Based on the results of Phase I, AFMLS then plans to remove itself entirely from the processing of equitable sharing requests involving judicial forfeitures of less than $1 million. Such equitable sharing paperwork will then flow directly from the seizing agency headquarters, to the U.S. Attorney's Office, and then to the U.S. Marshals Service for payment. Phase II will be announced later this year.

AFMLS's Role

Department of Justice policy requires AFMLS to review equitable sharing that involves $1 million or more or the transfer of real property and to make a recommendation to the Deputy Attorney General or the Deputy Attorney General's designee, who is the final decision maker in those cases.

AFMLS will continue to develop and advise on equitable sharing policy and ensure that participants comply with the policies governing the program. It will continue to resolve equitable sharing disputes among requesting agencies, U.S. Attorneys' Offices, and seizing agencies, regardless of the value of the forfeiture.

AFMLS will coordinate with all components to ensure a smooth transition to the new procedures and is available to review any procedures prepared by the components affected by these changes. Questions or comments should be addressed to Deputy Chief Nancy L. Rider, AFMLS, at (202) 514-1287.

Questions & Answers

Concerning Agreement, Certification, and Audit Report Requirements

by Araceli G. Carrigan, Attorney, AFMLS, Criminal Division, and Rebecca Brown, Equitable Sharing Program Manager, Treasury Executive Office for Asset Forfeiture, Department of the Treasury

In March 1994, the Department of Justice issued *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*. In October 1996, the Department of the Treasury issued the *Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement Agencies*. These guides set forth a number of reporting requirements to protect the Department of Justice and the Department of the Treasury's equitable sharing programs against potential fraud, abuse, and waste. In order to allow the sharing of funds, the state or local agency must comply with certain reporting requirements. The following frequently asked questions are provided to clarify reporting requirements for any official who deals with equitable sharing. We plan to include more frequently asked questions in upcoming issues of the *Asset Forfeiture News*.

Q What are the reporting requirements?

A Every state or local law enforcement agency that receives cash, proceeds, or property as a result of a federal forfeiture must submit: (1) the Federal Sharing Agreement; (2) the Annual Certification Report; and (3) an annual audit, if an agency receives more than $100,000 during the fiscal year, or maintains more than $100,000 in its federal forfeiture account during the fiscal year.

Q Who enforces the agreement, certification, and audit reporting requirements?

A The Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, enforces the reporting requirements for the Department of Justice. The Treasury Executive Office for Asset Forfeiture (TEOAF) enforces the requirements for the Department of the Treasury.

Q Where should the reporting documents be sent? If my agency submits the reporting documents to the Department of Justice, do I also have to submit a copy to the Department of the Treasury?

A An agency that participates in both Department of Justice and Department of the Treasury's equitable sharing programs must send a copy of the reporting documents to both agencies at the following addresses:

- Asset Forfeiture and Money Laundering Section
  Criminal Division
  U.S. Department of Justice
  1400 New York Avenue, NW
  Bond Building, Room 10100
  Washington, DC 20005

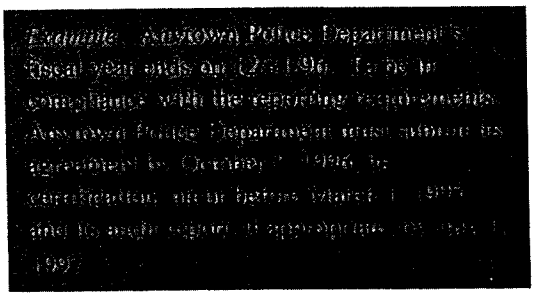
- Executive Office for Asset Forfeiture
  U.S. Department of the Treasury
  740 15th Street, NW, Suite 700
  Washington, DC 20020

Q When are the deadlines for complying with the reporting requirements?

A
- Effective with the 1997 federal fiscal year, the Federal Sharing Agreement is due every three years, on or before October 1. (An agreement form stamped "valid through September 30, 1999" must be used.)

- The Annual Certification Report is due 60 days after the close of the agency's fiscal year.

- The audit report is due 180 days after the close of the agency's fiscal year.



Q: Why were my agreement and certification forms returned for noncompliance?

A: Every agreement and certification form is reviewed for noncompliance. Agreement and certification forms should contain the following information: the complete address; the contact person's name and phone number; an NCIC number; the ending date (month and year) of the agency's fiscal year (*i.e.*, 1997 alone is not sufficient); and the appropriate signatures (*see* the next question). As to the certification form, agencies that entered an amount in *line h* (total spent on other law enforcement expenses) and in *line i* (total pass-through for non-law enforcement uses), should attach a list of expenses or recipients. If these items are not complete, the certification form will be returned for noncompliance.

Q: We submitted the agreement and certification forms with the signatures of the chief of police for the law enforcement agency and the deputy chief for the governing body. Why were my forms determined to be noncompliant?

A: The police chief appropriately signed the forms. However, the deputy chief (or the district attorney, or the deputy sheriff are other examples) is *not* a representative of the governing body. A representative of the agency that has budget oversight over the law enforcement agency should sign the form. In addition, signatories must *not* belong to the same agency.

Q: Why should there be a signature of a governing body representative?

A: Equitably shared funds must be used to increase not supplant the resources of the receiving agency. By requiring a representative to sign the forms, the governing body is put on notice that the budget of the law enforcement agency must not be decreased by the amount of sharing funds it receives.

Q: What happens when a state or local agency does not submit the reporting documents?

A: The submission of the reporting documents is a prerequisite to sharing. Sharing of funds may be withheld or denied if an agency does not comply with the requirements.

Q: Should an agency that participates in both Department of Justice and Department of the Treasury's equitable sharing programs maintain a separate account for the sharing funds received from Justice and Treasury?

A: Sharing funds from the Department of Justice and Department of the Treasury's equitable sharing programs must be accounted for *separately*.

Q: Whom should I call if I have any questions regarding the reporting requirements?

A: For agencies that participate in the Department of Justice equitable sharing program, call Araceli Carrigan at (202) 616-5088. For those agenices that participate in the Department of the Treasury equitable sharing program, call Rebecca Brown at (202) 622-2807.

U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

QR-AUG-97.RLF

Quick Case

A Monthly Survey of Federal Forfeiture Cases

Volume 10, No. 8 **August 1997**

Criminal Forfeiture / Joint and Several Liability

- **District court must announce the forfeiture portion of a defendant's sentence in his presence. Failure to comply with Fed. R. Crim. P. 43(a) means that criminal forfeiture order must be vacated.**

Defendant and several co-defendants were convicted in a "reverse sting" drug case in which they attempted to purchase drugs from an undercover agent. Each defendant was ordered to forfeit the identical sum of $44,409, representing the sum used to commit the underlying offense.

On appeal, Defendant argued that the district court erred in holding each of the defendants jointly and severally liable for the amount subject to forfeiture. The **D.C. Circuit** noted that the appellate courts that have addressed this issue are unanimous in holding that co-defendants are jointly and severally liable for forfeiture under 21 U.S.C. § 853. However, the court found it unnecessary to reach that issue for the following reason.

The Government conceded that the district court had failed to announce the forfeiture portion of Defendant's sentence in his presence. Federal Rule of Criminal Procedure 43(a) requires that the defendant be present at sentencing. Accordingly, the forfeiture—which is an aspect of the sentence—was void.

Rather than remand the case, the court, at the Government's suggestion, simply vacated the forfeiture count as it applied to Defendant. The Government suggested this procedure because it had determined that the cost of bringing the Defendant back to court did not make it worthwhile to further pursue the criminal forfeiture against him. —*SDC*

United States v. Gaviria, ___ F.3d ___, 1997 WL 351217 (D.C. Cir. Jun. 27, 1997). Contact: AUSA William D. Weinreb, ADC04(wweinreb).

Comment: For an earlier, unpublished case on this issue, *see United States v. Shannon*, 1996 WL 341352 (9th Cir. 1996) (Table Case) (order of forfeiture vacated because judge failed to mention forfeiture at sentencing, even though forfeiture was included in the indictment and plea agreement and the court amended judgment eight days after sentencing to include order of forfeiture). —*SDC*

Criminal Forfeiture / Pretrial Restraining Order

- **District court holds that defendant's wife, mother and daughter may challenge pretrial restraint of their property in a criminal forfeiture case.**

- **Third party is entitled to return of restrained property if it is clear that the property belongs to the third party and not the defendant; if the property is commingled, however, the third party must wait to the ancillary proceeding to challenge the forfeiture.**

After Defendant was indicted on RICO charges, the court issued an *ex parte* pretrial restraining order against various assets, including assets held jointly by Defendant and his family members. Defendant's wife, mother and daughter all challenged the restraining order, seeking the immediate release of property that they alleged was not subject to forfeiture. (The wife was also a defendant in the case but was not charged with RICO; therefore, she was considered a third party for purposes of the challenge to the restraining order.)

The district court first considered whether a third party is entitled to challenge a pretrial restraining order in a criminal case. It noted that normally a third party must await the ancillary proceeding to contest the criminal forfeiture of property. *See* 18 U.S.C. § 1963(i). The First Circuit has held, however, that due process considerations may require a court to entertain third party challenges to a restraining order in some circumstances. *See United States v. Real Property in Waterboro*, 64 F.3d 752, 754 (1st Cir. 1995).

Noting that the trial in the criminal case was not scheduled to begin for another six months, the court held that it was appropriate to grant the third parties a "timely pretrial opportunity to challenge the restraining order." Relying on *Waterboro*, the court went on to conclude that the third parties were barred from challenging "the validity of the indictment," but it held that they could attack the restraining order "as 'clearly improper' on the ground that the property was not available for forfeiture."

The court then proceeded to apply this holding to the claims of the three family members.

The Mother's Claim. Defendant's mother argued that one of the restrained bank accounts contained funds that were traceable to the deposit of her Social Security checks. The Government argued that Defendant had also deposited funds into the same

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Your forfeiture cases, both published and unpublished, are welcome. Please fax your submission to Denise Mahalek at (202) 616-1344 or mail it to:

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account, and that under the "last out" rule of *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), it was entitled to assume that the money in the account belonged to Defendant. The court held that under *Banco Cafetero*'s "lowest intermediate balance" test, approximately half the money in the account was arguably the defendant's property, but that the remainder was indisputably the property of his mother. Accordingly, the court released the latter amount to the mother and left the remainder subject to the restraining order so that the mother could challenge its forfeiture in the ancillary proceeding if and when Defendant was convicted.

The Daughter's Claim. Defendant's daughter alleged that she had inherited $13,000 from her Aunt Charlotte, which funds were invested in a joint certificate of deposit account with Defendant. There was no evidence linking any of the funds to Defendant's racketeering activity. Accordingly, the court released the restrained funds to the daughter. In so doing, the court dismissed the Government's argument that the Government had already released a considerable sum of money to the daughter and other family members and that therefore the daughter would not suffer any hardship if forced to await the ancillary proceeding to litigate her interest in the joint account.

The Wife's Claim. Finally, Defendant's wife asserted that the proceeds of the life insurance policy on her deceased son were invested in a joint bond fund with Defendant. These funds were commingled with money the Defendant obtained from other sources, which funds were clearly forfeitable under the terms of the indictment. Because such forfeitable funds were commingled in the account, the court held, "any challenge to the restraint of the assets [would be] a frontal assault on the validity of the indictment, which is impermissible under *Waterboro.*" Moreover, the court found that "a final determination as to which portion [of the account], if any, should not be forfeited will require a detailed accounting analysis." Therefore, the court concluded that it would not modify the restraining order as to any portion of the account, and would require the wife to wait until the ancillary proceeding to litigate her claim. —*SDC*

United States v. Siegal, Crim. No. 97-10002-PBS (D. Mass. Jun. 24, 1997). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

Comment: The court in this case struggles to articulate a consistent rule regarding a third party's right to challenge a pretrial restraining order. That it succeeds only to a limited extent may be due to the vagueness in the First Circuit's decision in *Waterboro.*

In that case, which is the leading case on third-party challenges to a pretrial restraining order, the court appeared to hold that a third party may participate in the restraining order proceeding, but may not challenge the validity of the indictment or raise ownership issues. Superior ownership claims must await the ancillary proceeding, the court said, but a claimant may raise "prudential arguments concerning the burdens of restraint" pretrial. But exactly what "prudential arguments" may a thrid party raise? We have concluded that a third party may challenge a pretrial restraining order on the ground that it is clearly improper—*e.g.*, it simply restrains the wrong property—or that less intrusive means exist for preserving the property pretrial. But that a third party may never challenge the forfeitability of the property (*i.e.*, raise a challenge to the validity of the indictment), and may only raise superior ownership issues—the kinds of issues that are litigated in the ancillary proceeding—if the third party alleged that he would suffer immediate and irreparable harm if not granted a timely opportunity to challenge the restraining order. *See* Stefan D. Cassella's article, "Third Party Rights in Criminal Forfeiture Cases," *Criminal Law Bulletin*, Vol. 32, No. 6, (November/December 1996), at p. 499-540.

The court in this case seems to take a somewhat different view of *Waterboro.* It holds that the third party may not make a "frontal assault" on the validity of the indictment, yet it holds that he may challenge the restraining order on the ground that "the property was not available for forfeiture." Does the court

mean that it is "not available for forfeiture" because it lacks any nexus to the offense? Or because it belongs to someone other than the defendant? If the former, what distinction does the court intend to make between challenging the validity of the indictment—which the court says is improper—and challenging the nexus between the property and the offense? Apparently, the court viewed the latter challenge as fairly raised. Other courts seem to agree, though the ownership and nexus issues are difficult to parse. *See United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (restraining order vacated where forfeitability of property not demonstrated and property belonged to third party); *United States v. Scardino*, ___ F. Supp. ___, 1997 WL 7285 (N.D. Ill. Jan. 2, 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name).

In our view, a third party should not be able to challenge a restraining order on "lack of nexus" grounds. In the ancillary proceeding, the third party is limited to one challenge: superior ownership. He may not argue that the property should not have been forfeited in the first place because the requisite nexus was not established. *See* 18 U.S.C. § 1963(l)(6) (setting for the only grounds on which a third party challenge may be raised); *United States v. Duboc*, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (ancillary proceeding is essentially a quiet title action in which only the ownership of the property is at issue). If that is so, then the third party should not be able to raise "lack of nexus" arguments in a pretrial challenge to the forfeitability of the property either. He should be limited to arguing that "the property really belongs to me, not to the defendant." And even that argument should be reversed for the ancillary proceeding unless this pretrial restraint is causing the third party some immediate and irreparable harm.

In ruling on the mother's and the daughter's claims, the court does not distinguish between nexus and ownership issues, so it is impossible to say whether the court would have reached the same conclusion based solely on the fact that those family members appeared able to assert a superior interest in the property, regardless of whether it bore any nexus to the criminal offense. What is clear, however, is that the court rejected the Government's argument that a third party should be able to challenge the restraining order on superior ownership (or nexus) grounds only if the third party was suffering an immediate and irreparable injury that made it impossible to wait for the ancillary hearing. In our view, this part of the opinion is incorrect. —*SDC*

Money Laundering / Standing

- **Money transmitter, who holds a client's money in a bank account in the transmitter's name for the purpose of transfer abroad, lacks standing to contest the forfeiture of the funds.**

- **To establish standing, a bailee cannot rely on simple possession of the property, but must identify the bailor and establish that the property is not related to, or the product of an illegal enterprise.**

- **Third party, who "fronted" money for a money transmitter by paying the beneficiary, expecting to be repaid by the transmitter, is merely a general creditor of the transmitter who lacks standing to contest the forfeiture of the funds in the transmitter's account.**

Claimants were money transmitters who received money from customers, deposited the money into bank accounts, and transmitted the money to designated beneficiaries. The bank accounts were held in Claimants' names at banks in New York and were specifically established for the purpose of receiving and transmitting customer funds. The Government instituted civil forfeiture actions against the accounts, alleging that certain funds received by Claimants and deposited into the accounts were forfeitable under 18 U.S.C. § 981 (money laundering) and 21 U.S.C. § 881 (drug trafficking).

In an earlier case, the court held that the Government had established probable cause for the seizure of the funds. *United States v. All Funds on Deposit . . . Perusa, Inc.*, 935 F. Supp. 208 (E.D.N.Y. 1996) (Government may rely on section 984 to establish forfeitability of funds in money transmitter's account, even if the tainted funds have already been disbursed) (*Quick Release,* September 1996, at pp. 7-8). Subsequently, the court, *sua sponte*, asked the parties to brief the question whether Claimants, as money transmitters, had standing to contest the forfeiture of the money in their accounts.

Claimants offered a number of arguments to support their standing. First, the money was seized from accounts held in their names and over which they had exclusive possession and control. Second, Claimants would suffer financial liability—including contractual liability to their customers and regulatory penalties—if they failed to deliver the money to the designated beneficiaries. And third, Claimants had already transferred most of the money alleged to be drug proceeds to the beneficiaries; the funds seized from their accounts were subject to forfeiture only by virtue of the fungible property provision in section 984; and Claimants were the only parties with a legitimate claim to those funds.

But the court denied the claims for lack of standing. Generally, the court said, courts will not deny standing to a claimant who has a "colorable possessory interest" in property subject to forfeiture. But simple possession is not enough. If the claimant is not the owner of the property, he must at least exercise dominion and control over it. The money transmitters in this case took possession of the property only for the purpose of transferring it to designated beneficiaries. In essence, they acted as bailees who lacked the degree of control over the property to satisfy the standing requirement.

That the money was held in bank accounts in Claimants' names was of little consequence, the court said. Claimants were obligated by statute to keep their customers' funds in such accounts. Moreover, it was not the "accounts" that the Government was seeking to forfeit, but the money in the accounts. The accounts might have been in Claimants' names, but

the relationship between the Claimants and their customers was similar to a "special deposit" relationship between a bank and a depositor in which title to the money remains with the depositor and the bank is simply the custodian. Claimants' contractual liability to the customers was simply a consequence of this arrangement.

"As in the case of a special deposit," the court held, "Claimants did not obtain title to the defendant funds by virtue of their title to the accounts. Their limited and circumscribed possession of the defendant funds does not translate into a concomitant right to contest the forfeiture of such funds."

Moreover, the court ruled that in the case of a claim filed by a bailee, possession plus dominion and control is not enough: the claimant must also establish "that the interest in the seized property is legitimate and not the product of illegal activity." In other words, a courier/bailee who exercises dominion and control over currency would nevertheless lack standing to contest its forfeiture if the bailment consisted of drug money or money from some other illegal source.

The concern is that bailees may seek to hide behind the bailment to conceal an "illicit interest" in the seized property. Such claims, the court held, should not be permitted. Thus, to overcome this additional hurdle, the bailee must identify the bailor/owner of the property in question. In any event, the court noted, "the failure to identify the bailor of the defendant funds is fatal to a claimant's statutory standing." *See* Rule C(6) (requiring bailees asserting claims to identify the bailor).

The last issue in the case concerned a claim filed by a bank in Colombia that acted as one of the Claimant's correspondents. When a money transmitter receives money from a customer in New York, with instructions to pay a beneficiary in another country, the transmitter typically arranges for a correspondent in the receiving country to pay the beneficiary. The transmitter then reimburses the correspondent.

In this case, the correspondent paid the beneficiary but was not reimbursed by the money transmitter because the transmitter's account was seized. The correspondent therefore asserted an interest in the seized funds. But the court rejected this claim for lack of standing as well. It is well established, the court held, that a general unsecured creditor lacks standing to contest the forfeiture of its debtor's funds. "A claim of entitlement to payment is not synonymous with a claim to an ownership interest in the seized funds." Because the Colombian correspondent was an unsecured general creditor of the New York money transmitter, it lacked standing to contest the forfeiture. —*SDC*

United States v. All Funds on Deposit . .. Perusa, Inc., CV-96-3081 (E.D.N.Y. Jun. 18, 1997). Contact: AUSA Elliot Schachner, ANYE03(eschachn), and AUSA Jennifer Boal, ANYE03(jboal).

Comment: The court's holding on the final point is unassailable. A general creditor may not contest the forfeiture of funds from a debtor, even if the creditor had reason to expect that the seized funds were earmarked to pay the debt. Without some secured interest, a creditor simply lacks the degree of ownership in the seized property to contest its forfeiture, regardless of what his expectations may have been. *See United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir.), *cert. denied*, 115 S. Ct. 2613 (1995); *United States v. $20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992).

Thus, the court is on solid ground in rejecting the claim of the Colombian correspondent for lack of standing. The New York money transmitter owed the correspondent a debt, to be sure, but that debt did not give the correspondent any legal interest in the forfeited funds. The holding regarding the transmitters' standing to contest the forfeiture of the funds held in their own names, however, is somewhat surprising.

In a series of both criminal and civil forfeiture cases, courts have held that when a person voluntarily transfers his money to another, he transfers title to the funds to the transferee and thereby surrenders any right to contest the forfeiture of those funds. *United States v. $3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to seized bank account, title passed to perpetrator, making claimant an unsecured creditor without standing); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997) (person who transferred funds to defendant's bank account after account was frozen by the Government is merely a general creditor with cause of action against defendant for return of its money). Therefore, the person who has standing to contest the forfeiture of the funds involved in such a transaction is generally the transferee.

That rule was recently applied in two cases in which customers deposited money in a money transmitter's account with instructions to transfer the money to relatives in Pakistan. In *United States v. $79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996), the court held that the customers transferred title to the funds to the account holder and therefore lacked standing to contest its forfeiture. If anyone had standing, the court held, it was the account holder who had title to and control over the funds in his account. The court in that case specifically rejected the notion that the deposit of the money in the third party's account constituted a "special deposit" or a bailment. *See Quick Release* (December 1996), at pp. 10-11.

Similarly, in *United States v. All Funds on Deposit . . . in the Name of Kahn*, ___ F. Supp. ___, 1997 WL 60949 (E.D.N.Y. Feb. 11, 1997), the court held that customers who gave a money transmitter money to transfer to relatives in Pakistan lacked standing to contest forfeiture of transmitter's bank accounts under sections 981 and 984, because they had transferred title to the money transmitter in much the same way as a depositor transfers title to his money to his bank when he makes a deposit. *See Quick Release* (March 1997), at pp. 2-3.

While *Perusa*, *$79,000* and *Kahn* appear superficially to be in conflict—after all, *someone* has to have standing to contest the forfeiture of funds in a money transmitter's account—the facts of these cases are not identical. In *$79,000*, for example, the court stressed that a bailor/customer would have standing to contest the forfeiture of money given over to a money transmitter if a valid bailment were created under state law. Such a bailment is one where the customer retains control over his property; but in *$79,000*, no such bailment was created. At the same time, in *Perusa*, the court suggested that the bailee/money transmitter might have had standing if it had identified the bailor and established both its control over the property pursuant to the bailment and the legitimate source of the money. —*SDC*

Excessive Fines / Gambling / Statute of Limitations

- **Statute of limitations for civil forfeiture runs from the time federal authorities become aware of the offense, regardless of when state authorities became involved.**

- **Forfeiture of real property used to conduct a gambling operation is not excessive under the Ninth Circuit's Eighth Amendment analysis where the owner was directly involved in the operation for many years and made a substantial profit.**

- **An owner's claim that a forfeiture is unduly harsh because of the "intangible, subjective value of the property" is belied by his attempt to sell the property while the forfeiture action was pending.**

The Government filed a civil forfeiture action under 18 U.S.C. § 1955(d) against real property used to conduct a cockfighting operation in the District of Hawaii. The property comprised an arena with bleachers, concession stands and a cockfighting pit. Cockfighting is a violation of Hawaiian state gambling laws. The property was forfeited and Claimant appealed to the **Ninth Circuit.**

Claimant objected first that the complaint was filed outside the statute of limitations. 19 U.S.C. § 1621 permits the Government to file a civil forfeiture action within five years of the discovery of an offense. Claimant argued that state authorities knew about the cockfighting operation as long ago as 1986. The Government argued, however, that federal authorities did not learn of the violation until 1993.

The forfeiture action, the court held, is based on a violation of federal law—*i.e.*, section 1955. Therefore, "the federal crime could not be 'discovered' [for purposes of the statute of limitations] until federal agents became involved." Because Claimant failed to prove that any federal agents were aware of the offense until 1993, the statute of limitations did not begin to run on the federal forfeiture action until that date, regardless of when the state authorities became aware of the state violation.

Next, Claimant argued that the Government failed to establish a section 1955 violation. That statute requires proof of 1) a violation of state gambling law, 2) involving five or more persons, that was 3) in substantially continuous operation for more than 30 days. The second and third elements are distinct, the court said. The Government must show that the gambling operation existed for more than 30 days and involved five or more people, but it need not show that all five people were involved during the same 30-day period. Thus, the Government had sufficient evidence to establish probable cause for the federal offense.

Finally, the court rejected Claimant's assertion that the forfeiture of the property was unconstitutionally excessive. Employing the Eighth Amendment test set forth in *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), the court held first that there was clearly a substantial connection between the cockfighting arena and the gambling violation. "With its bleachers, cockfighting pit, and concession stands, [the property] was to Hawaiian cockfighting what Wrigley Field is to baseball."

Moreover, the forfeiture was not grossly disproportionate to the offense. The owner was directly involved in the violation for many years and earned substantial profits from it. As to the "harshness" factors that must be considered in the Ninth Circuit, the court held that whatever argument Claimant may have had regarding the "intangible,

subjective value of the property" was belied by his efforts to sell the property while forfeiture proceedings were pending. Thus, the court concluded, "the Eighth Amendment claim must fail."

—*SDC*

United States v. Real Property Titled in the Names of Kang and Lee, ___ F.3d ___, 1997 WL 393084 (9th Cir. Jul. 15, 1997). Contact: AUSA Beverly Wee Sameshima, AHI01(bsameshi).

Laches / Notice / Statute of Limitations

- **Failure to send written notice to a person "appearing to have an interest" in seized property, as required by 19 U.S.C. § 1907, violates due process.**

- **Defendant's strategic decision to wait to raise his due process claim until after the statute of limitations had run was not barred by the doctrine of laches; Defendant has no duty to save the Government from the consequences of its own carelessness.**

- **Where the statute of limitations has run on the filing of a civil forfeiture action, the remedy for a due process violation is for the district court to proceed immediately to consider the forfeiture on the merits, based on the evidence already in the record.**

Defendant was the captain of a vessel used to smuggle marijuana into the United States. He was arrested in 1991, and pled guilty to the smuggling offense.

At the same time, the Drug Enforcement Administration (DEA) seized the vessel and sent notice of the administrative forfeiture to Defendant's co-defendant, who DEA thought was the owner. It also published notice in *USA Today*. But despite having information indicating that Defendant was also an owner of the vessel, DEA never sent notice to Defendant himself. When no one filed a claim, the vessel was forfeited.

Four years later, in 1995, Defendant filed a section 2255 motion to vacate his criminal conviction on double jeopardy grounds. Relying on the Ninth Circuit's decision in *$405,089.23*, he argued that the prior administrative forfeiture of his vessel barred his conviction. The district court denied the double jeopardy claim and the Ninth Circuit affirmed.

Finally, in 1996, after the statute of limitations had run on the civil forfeiture of the vessel, Defendant filed a Rule 41(e) motion for the return of seized property, asserting for the first time that DEA's failure to send him notice of the administrative forfeiture as required by 19 U.S.C. § 1607 deprived him of his due process rights.

The Government responded that it was clear from the section 2255 motion that Defendant was aware of the seizure of the vessel as least as early as 1995. Yet, for strategic reasons, Defendant elected not to seek to vacate the forfeiture until after the statute of limitations had run—thus, barring the Government from filing a civil forfeiture complaint and litigating the case on the merits. Accordingly, the Government argued that the doctrine of laches should apply, and that the Rule 41(e) motion should be dismissed. In the alternative, the Government suggested that if the Rule 41(e) motion were granted, it should be permitted to file the forfeiture complaint

notwithstanding the expiration of the limitations period.

The court began by holding that the failure to send Defendant notice of the administrative forfeiture violated his due process rights. Section 1607 requires notification of any who "appears to have an interest" in the seized property. Although DEA was aware that Defendant had an apparent interest, it violated the statute when it failed to send him written notice, and under *Mullane v. Central Hanover Bank & Trust Co.*, 339 US. 306 (1950) (Government must take steps "reasonably calculated" to afford notice), the lack of notice violated Defendant's right to due process.

The court also held that even though no criminal action was pending, it had jurisdiction to consider Defendant's Rule 41(e) motion by converting it into a civil action for equitable relief.

The court acknowledged that Defendant was aware of the administrative forfeiture long before the expiration of the statute of limitations, yet failed to seek the return of his property for strategic reasons—first, so that he would not undermine his double jeopardy claim ("for obvious reasons, at that time, he wanted the forfeiture to stand"); and later, to allow the limitations period to expire. Nevertheless, the court held, the doctrine of laches would not bar the Rule 41(e) motion.

For laches to apply, the Government must demonstrate prejudice resulting from the delay. "Although the Government is undoubtedly prejudiced by the fact that the statute of limitations now precludes it from filing judicial forfeiture proceedings, it was not defendant's delay so much as the Government's own carelessness that precipitated this state of affairs." At any time between 1991—when DEA became aware of Defendant's ownership interest—and 1996, the Government could have filed a civil forfeiture action. Although Defendant did delay in asserting his rights, the court continued, "it was not his duty to prevent the Government from losing its rights due to carelessness."

The Government countered that even if laches did not apply, the court should reject the Rule 41(e) motion because Defendant was not prejudiced by the notice violation. It pointed to evidence in the record that amply demonstrated the legal basis for the forfeiture of the vessel, including admissions Defendant made in his guilty plea. But the court held that the right of a person to contest a forfeiture in district court does not depend on whether he has any colorable claim to the property. Quoting *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), the court held that when a person is deprived of due process, "it is no answer to say that . . . due process of law would have led to the same result because he had no adequate defense on the merits."

The last issue was what remedy should be granted for the due process violation. Defendant demanded the return of the seized vessel, or the value of the vessel when it was sold. The Government argued that it should be allowed to re-open the forfeiture proceedings and litigate the forfeiture on the merits, regardless of the statute of limitations bar.

The court noted that most circuits permit the Government to remedy a due process violation by filing either an new administrative forfeiture or civil judicial forfeiture action. *See, e.g., Muhammed v. DEA*, 92 F.3d 648 (8th Cir. 1996); *United States v. Giraldo*, 45 F.3d 509 (1st Cir. 1995); *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996). But in none of those cases had the statute of limitations expired. In *Boero v. United States*, 111 F.3d 301 (2d Cir. 1997), however, the Second Circuit held that the proper remedy for defective notice was to direct the district court to consider the claim on the merits, even though the statute of limitation had expired.

Following *Boero*, the court proceeded to review the merits of the case without requiring the Government to file a new forfeiture action. Based on Defendant's admissions in his guilty plea, the court held that the forfeiture was supported by the evidence. Accordingly, the motion for the return of seized property was denied. —*SDC*

United States v. Marolf, ___ F. Supp. ___, 1997 WL 400804 (C.D. Cal. Jul. 11, 1997). Contact: AUSA Carla Ford, ACAC01(cford).

Comment: One issue the court did not discuss—perhaps because it was not raised by the Government—is whether, aside from the doctrine of laches, there isn't a statute of limitations on a claimant's ability to re-open an administrative forfeiture action on due process grounds. A number of courts have considered this question. *See* Greg Paw's article, "Judicial Review of Administrative Forfeitures" in the *Asset Forfeiture News* (January/February 1996), page 1. *See also Williams v. DEA*, 51 F.3d 732 (7th Cir. 1995) (applying two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined"); *Demma v. United States*, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory); *Mullins v. United States*, 1997 WL 55946 (S.D.N.Y. 1997) (Rule 41(e) motion filed after criminal case is complete is a new civil action that must be filed within six years of seizure of the property; *see* 28 U.S.C. § 2401). Also, pending legislation would put a definite two-year limit on such actions. *See* H.R. 1965, Section 2, 105th Cong., 1st Session. AUSA Bill Pericak (N.D.N.Y.) has filed a brief on this issue in the Second Circuit which is available to anyone needing assistance.

This decision also contains an exceptionally clear and thorough description of the administrative forfeiture process that could be cited whenever it is necessary to explain that process to a judge or magistrate.

—*SDC*

Discovery / Motion to Suppress

- **Claimant may not avoid being deposed on the ground that a pending suppression motion would obviate the need for discovery if resolved in her favor.**
- **If the Government relies on tainted evidence in conducting a deposition, and the evidence is later suppressed, the court must conduct a *Kastigar* hearing to determine if the deposition testimony is tainted.**
- **A motion to suppress is probably not an affirmative defense that must be pled in the claimant's answer under Rule 8(c).**

The Government filed civil forfeiture actions against three parcels of real property and noticed Claimant's deposition. Claimant, however, refused to be deposed on the ground that she had filed a motion to suppress evidence based on an illegal search and an illegal wiretap. She contended that the Fourth Amendment issues should be resolved first because their resolution might obviate the need for any further discovery.

The Government moved to compel discovery on the ground that the existence of a pending motion to suppress is no reason to suspend discovery. The district court agreed. There is no reason, the court held, why discovery should proceed piecemeal or be suspended while a motion to suppress is resolved.

It is true, the court said, that if discovery proceeds and Claimant later prevails on the suppression motion, the court may have to conduct a *Kastigar* hearing to determine if any of the discovery is the fruits of the illegal seizure. But that is no reason for Claimant to decline to be deposed.

With respect to one of the parcels of property, the Government moved to strike the claim for lack of standing. The court held that it was appropriate to

address that issue before resolving the suppression motion, because if the motion to strike for lack of standing was granted, the suppression motion would be moot as to that property.

Finally, the Government suggested that the suppression motion should be denied because Claimant failed to plead it as an affirmative defense under Fed. R. Civ. P. 8(c), in her answer. In *dicta*, the court suggested that a motion to suppress in not an affirmative defense that has to be pled in an answer the way, for example, a statute of limitations claim must be pled. "Rather, it seems more analogous to a motion in limine or an objection to the introduction of evidence, which need not be raised under Rule 8(c)." But the court avoided resolving the issue by permitting Claimant to amend her answer to include the motion to suppress. —*SDC*

United States v. Lot Numbered 718, 1997 WL 280603 (D.D.C. May 16, 1997) (unpublished). Contact: AUSA William R. Cowden, ADC01(wcowden).

Ancillary Proceeding

- **Claimant whose counsel failed to file a timely claim in the ancillary proceeding is not entitled to relief under Rule 60(b), even though counsel's failure was not Claimant's fault.**

Claimant was personally served with a preliminary order of forfeiture against certain real property in a criminal case. She turned the order over to her attorney, advising him that she retained a mortgage interest in the property when she sold it to the defendant. Although the attorney assured her that her rights would be protected, he failed to file a claim to the property or to take any other action to protect Claimant's interest.

Upon receiving notice of the final order of forfeiture, Claimant again contacted her attorney. The attorney assured her that her interest would be protected, but never filed any documents with the court. Upon learning that her attorney did nothing, Claimant retained new counsel who filed a motion to re-open the judgment of forfeiture.

Claimant argued that her failure to file a claim in the original proceeding was due to the negligence of her former attorney and not her own negligence. Proceeding under Fed. R. Civ. P. 60(b), the court addressed whether an attorney's unexplained failure to file a claim to forfeited property within the time set by the court constitutes mistake, inadvertence, surprise or excusable neglect.

The court held that the question is whether the attorney, as the litigant's agent, did all he reasonably could to comply with the court's deadlines, not whether the litigant did everything she reasonably could to police the conduct of the attorney. Because Claimant did not proffer any reasons for her attorney's failure to file a claim within the time permitted, the court held that it could not conclude that his conduct was inexcusable under Rule 60(b) and denied the motion to re-open the forfeiture. —*MML*

United States v. Alequin, Crim. No. 1:CR-95-014 (M.D. Pa. Jun. 3, 1997) (unpublished). Contact: AUSA John J. McCann, APAM01(jmccann).

Remission Petition

- **Court may review the denial of a remission petition if, in denying the petition, the seizing agency fails to comply with its own regulations and thereby denies the claimant due process.**

- **The Drug Enforcement Administration (DEA) may not rescind a decision granting a remission petition because doing so on the basis of unwritten regulations violates the claimant's due process rights.**

DEA seized a pick-up truck involved in a drug-related offense. Claimant, who sold the vehicle to the drug defendant, filed a petition for remission seeking to recover his security interest in the vehicle.

DEA informed Claimant that his petition was granted and gave him instructions on how to reclaim the truck. Claimant presented the letter to a DEA agent at the storage facility, but the agent would not release the truck, stating that he had not received authorization to do so.

Subsequently, DEA informed Claimant that his petition had been denied because further investigation revealed that the documentation in support of his petition had been falsified. Claimant requested a reconsideration, but his reconsideration was denied.

Claimant filed a complaint in district court asking the court to order DEA to release the truck, pay conversion damages, and enjoin any further investigations directed at him. In response, DEA argued that the remission process was an administrative proceeding and that the court lacked jurisdiction over the subject matter. The court found, however, that while Claimant's decision to pursue the property through the petition process waived his right to judicial review of the forfeiture action, the court could properly exercise jurisdiction where an agency violates its own regulations for dealing with an administrative forfeiture.

The court found that DEA violated its own regulations in rescinding its grant of remission and that DEA violated Claimant's due process rights by basing its rescission on unwritten policy. DEA was ordered to return the truck to Claimant.

DEA attempted to frame the central issue of the case as Claimant's failure to properly establish his security interest. The court, however, found the pertinent issue to be whether DEA complied with its regulations when it rescinded the granting of Claimant's petition. DEA was unable to produce any regulations establishing procedures for rescinding a petition where remission has been granted. Thus, the court determined that the issue was whether DEA's taking of an action not specified in its regulations violates those same regulations. The court found that it did.

The court recognized that agencies must be provided discretion in carrying out the various duties assigned to them, but it was another matter to allow DEA to possess unbridled discretion to take actions outside the procedures established by the agency's regulations. DEA argued that an absence of regulations does not prohibit it from rescinding a grant of a petition. The court, however, relied on the statutory construction principle of *expressio unis est exclusio alterius* (codes prohibit what they do not expressly sanction) and found that DEA is limited to the measures specifically enumerated in section 9.7 and that DEA is precluded from utilizing other protective measures, such as an unwritten procedure for rescinding grants of remission.

The court then held that DEA's reliance on unwritten regulations to rescind its grant of remission to Claimant violated Claimant's due process rights and was invalid. The court further stated that DEA must administer the remission program under written standards and, if DEA cannot operate within its

current regulations, then it must see to it that additional regulations are written to provide standards for the needed activities. —*KAV*

Burke v. United States Department of Justice, ___ F. Supp. ___, 1997 WL 362502 (M.D. Ala. Jun. 9, 1997). Contact: AUSA John Harmon, AALM01(jharmon).

Immunity / Section 1983

- **A state policeman who stops a motorist for speeding, seizes his currency for a suspected connection with narcotics, and gives it to the Drug Enforcement Administration (DEA) for adoptive forfeiture, is entitled to qualified immunity from suit.**

- **A state policeman is justified in stopping a motorist for misdemeanor speeding and arresting him even if the policeman had an ulterior motive, may search him and the car incident to the arrest, and finding $10,050 in currency, may detain the currency for the arrival of a dope-sniffing canine.**

This was a civil suit pursuant to 42 U.S.C. § 1983 against a policemen for alleged violations of plaintiff's civil rights. The defendant stopped plaintiff's car and arrested him for misdemeanor speeding and searched his person and car incident to the arrest. Finding $6,050 cash on plaintiff's person and $4,000 cash in a wicker briefcase, he called for an organoleptic canine, which alerted to the money. Defendant gave the money to DEA, which adopted the seizure.

The district court entered judgment for the defendant upon a jury verdict. The Eighth Circuit reversed and remanded because plaintiff was *pro se*. At the retrial, the defendant argued that he was entitled to qualified immunity. The trial court held that its ruling at the first trial that defendant was not entitled to qualified immunity was the law of the case, which it could not change.

On appeal again, the **Eighth Circuit** reversed and remanded with instructions to enter summary judgment for the defendant. It ruled, first of all, that the law of the case does not bar a district court from reversing a ruling which it previously made. It then held that state police officers are entitled to qualified immunity from suit. It explained:

Once a defense of qualified immunity is raised, a plaintiff must offer "particularized" allegations of unconstitutional or illegal conduct. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The official is not required to guess the direction of future legal decisions, but must rely on preexisting case law for guidance. Whether any individual will be held liable for official actions "turns on the 'objective legal reasonableness' of the action." (citations omitted)

As for the stop, the Eighth Circuit explained that as long as the stop was justified by speeding, it doesn't matter that the officer may have had an ulterior motive for the stop. Moreover, "Regardless of whether [plaintiff] gave his consent for the search, [defendant] had the authority to search [plaintiff] and his vehicle pursuant to [plaintiff's] lawful arrest." The fact that plaintiff carried a large amount of cash in small denominations and lied about its origin gave defendant authority to detain the cash for a reasonable time in order to conduct a dog sniff. Since the detention was justified for these reasons it does not matter that the officer may have detained the currency for other reasons.

The fact that a dog alerted to the money justified giving it to DEA for adoption. —*BB*

Conrod v. Davis, ___ F.3d ___, 1997 WL 398569 (8th Cir. Jul. 17, 1997). Contact: AUSA Theodore A. Bruce, Telephone: (573) 751-3321.

Excessive Fines

■ Supreme Court brief filed in *United States v. Bajakajian.*

The Government filed its opening brief in *United States* v. *Hosep Krikor Bajakajian*, No. 96-1487, with the Supreme Court on Monday, July 14, 1997. The single issue presented is whether 18 U.S.C. § 982(a)(1) violates the Excessive Fines Clause of the Eighth Amendment by subjecting to criminal forfeiture currency that is about to be transported out of the United States without the filing of the CMIR report required by 31 U.S.C. § 5316 and regulations implementing that statute.

The owner of the currency ($357,144) pleaded guilty to willfully violating the CMIR reporting requirement after he and his wife were discovered attempting to leave the country with the currency concealed on their persons and in their luggage and personal effects, but he nevertheless contested the criminal forfeiture of the currency. The district court found that all of the currency was subject to forfeiture under section 982(a)(1), but held that forfeiture of the full amount would violate the Excessive Fines Clause of the Eighth Amendment at least absent proof that the currency was illegally derived or intended for an unlawful purpose. It mitigated the forfeiture to $15,000 or less than 3 percent of the full amount.

The Government appealed and a divided panel of the Ninth Circuit affirmed. 84 F.3d 334 (9th Cir. 1996). In affirming, however, a majority held that the forfeiture of *any* currency for violation of the CMIR reporting requirements violates the Excessive Fines Clause, reasoning that the currency is not an "instrumentality" of the reporting violation. The Government filed a petition for *certiorari* with the Supreme Court which was granted on May 27, 1997. 117 S. Ct. 1841.

The Government's argument has two parts, at least as applied to *criminal* forfeiture cases (although the first argument very clearly embraces both civil and criminal forfeitures).

First, the brief argues that the forfeiture of unreported currency is not excessive because unreported currency is an essential instrumentality of the CMIR reporting offense. Forfeiture of instrumentalities (defined as "property used or involved in the commission of an offense" that has a more than "incidental or remote relationship to the offense") is entirely remedial because it encourages property owners to take care that their property does not become involved in crime; prevents further use of the property in crime; and imposes an economic sanction that renders crime less profitable.

In view of these purposes, the forfeiture of instrumentalities, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; no additional inquiry into the culpability of the owner or the property's economic value is required.

Undeclared currency is justified on this basis because it is an "indispensable instrumentality" of the crime. Without the cash, there is no offense. The remedy prevents the use of unreported cash to conceal or further criminal activity or to evade other legal obligations; it encourages travelers to report information that is critical in the investigation of

criminal, tax, and regulatory matters. And it is precisely tailored to the magnitude of the violation—the more cash involved, the greater the potential harm posed by the unlawful activity.

Second, the brief argues that the criminal forfeiture of undeclared currency is not excessive because such a forfeiture is commensurate with the seriousness of the unreported currency offense. The criminal forfeiture of property used by a criminal in carrying out his offense is an inherently fitting penalty for commission of a serious crime and is justified as serving punitive purposes. The criminal owner effectively sets his own "fine" by electing to use his property in furthering a criminal venture. No analysis of the owner's culpability or the value of the property is required.

Moreover, in determining whether the amount of a financial sanction is excessive in relation to the seriousness of the offense, deference must be given to the legislature's assessment of the seriousness of the offense and the fitting penalties. Here, Congress has authorized a multi-year term of imprisonment, a fine, *and* a forfeiture of the very cash involved in the violation. Including the forfeiture as part of the criminal sentence is far from excessively punitive.

The Government's brief will be available on Westlaw. Oral argument is likely to be schedule for some time soon after the Court reconvenes on the first Monday in October with a decision sometime around the beginning of 1998. —*HHS*

United States* v. *Hosep Krikor Bajakajian, No. 96-1487, Government's brief filed July 14, 1997. Contact: AFMLS Assistant Chief Harry Harbin, CRM07(harbin).

Quick Notes

■ Affect on Sentence

Defendant filed an ineffective assistance of counsel motion, complaining that his attorney failed to apprise the court imposing sentence in a criminal case that Defendant had agreed to the civil forfeiture of his property. The court imposed a criminal fine, which in Defendant's view, might have been lower of the court had been aware of the forfeiture. In rejecting the motion, the court held that a civil forfeiture is not punishment and, therefore, does not preclude the imposition of a fine in a criminal case. Accordingly, counsel was not negligent in failing to raise the matter.

United States v. Daily, ___ F. Supp. ___, 1997 WL 371141 (N.D. Ill. Jun. 27, 1997). Contact: AUSA Segio Acosta, AILN01(acosta).

■ Restitution

Defendant argued that the amount of criminal forfeiture should be reduced by the amount of money the victim was able to recoup in civil litigation. The court held, however, that section 982 mandates the forfeiture of all "property involved" in a money laundering offense, and unlike statutory restitution provisions, "makes no provision for a set-off by reason of the victim's recovery."

United States v. Pelullo, 961 F. Supp. 736 (D.N.J. 1997). Contact: AUSA Mark Rufolo, ANJ02(mrufolo).

Topical Index

The following is a listing of cases that have appeared in the *Quick Release* during 1997 broken down by topic. The issue in which the case summary was published follows the cite.

• Indicates cases found in this issue of *Quick Release*

Abatement

Administrative Forfeiture

United States v. Deninno, 103 F.3d 82 (10th Cir. 1996) — Jan 1997

Vasquez v. United States, 1996 WL 692001 (S.D.N.Y. Dec. 3, 1996) — Jan 1997

Adoptive Forfeiture

In re $844,520.00 in United States Currency, No. 95-0674-CV-W-4 (W.D. Mo. Feb. 27, 1997) (unpublished) — May 1997

Edney v. City of Montgomery, ___ F. Supp. ___, 1997 WL 120020 (M.D. Ala. Feb. 28, 1997) — Apr 1997

Adverse Inference

Arango v. U.S. Dept. of the Treasury, 1997 WL 306993 (11th Cir. June 24, 1997) — July 1997

Affect on Sentence

- *United States v. Daily*, ___F. Supp. ___, 1997 WL 371141 (N.D. III June 27, 1997) — Aug 1997

Airport Seizures

United States v. One Lot of U.S. Currency ($36,634), 103 F.3d 1048 (1st Cir. 1997) — Feb 1997

United States v. Funds in the Amount of $9,800, 952 F. Supp. 1254 (N.D. Ill. 1996) — Feb 1997

Amendment of Complaint

United States v. $146,800, 96-CV-4882 (E.D.N.Y. Apr. 28, 1997) (unpublished) — June 1997

Ancillary Proceeding

- *United States v. Alequin*, Crim. No. 1:CR-95-014 (M.D. Pa. June 3, 1997) (unpublished) — Aug 1997

United States v. Ken International Co., Ltd.,1997 WL 229114 (9th Cir. May 2, 1997) — June 1997

United States v. Rutgard,1997 WL 174102 (9th Cir. Apr. 9, 1997) (unpublished) — June 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), 961 F. Supp. 282 (D.D.C. 1997) — May 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II), ___ F. Supp. ___, 1997 WL 202891 (D.D.C. Apr. 22, 1997) — May 1997

United States v. Ribadeneira, 105 F.3d 833 (2d Cir. 1997) — Mar 1997

United States v. BCCI Holdings (Luxembourg) S.A.(Petition of Pacific Bank), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Feb. 13, 1997) — Mar 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Security Pacific International Bank), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Jan. 17, 1997) — Feb 1997

Attorney's Lien

United States v. Murray, 1997 WL 136452 (D. Mass. 1997) (unpublished) — May 1997

Bankruptcy

In re: Brewer, 209 B.R. 575 (Bankr. S.D. Fla. 1996) — July 1997

United States v. Ken International Co., Ltd.,1997 WL 229114 (9th Cir. May 2, 1997) — June 1997

Bifurcated Proceedings

United States v. Ruedlinger, 1997 WL 161960 (D. Kan. Mar. 7, 1997) (unpublished) — May 1997

Bill of Particulars

United States v. Bellomo, 954 F. Supp. 630 (S.D.N.Y. 1997) — Feb 1997

Bona Fide Purchaser

United States v. Toyfoya, No. CR-93-0505-EFL (N.D. Cal. Mar. 27, 1997) (unpublished) — June 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II), ___ F. Supp. ___, 1997 WL 202891 (D.D.C. Apr. 22, 1997) — May 1997

Burden of Proof

- *United States v. $49,576.00 U.S. Currency,* 116 F.3d 425, (9th Cir. 1997) — July 1997

United States v. One Beechcraft King Air 300 Aircraft, 107 F. 3d 829 (11th Cir. 1997) — Apr 1997

United States v. Rogers, 102 F.3d 641 1996 (1st Cir. Dec. 23, 1996) — Jan 1997

Civil Rights Violation

Hines v. LeStrange, 1997 WL 37543 (N.D. Cal. Jan. 27, 1997) — Mar 1997

CMIR Forfeiture

United States v. Delgado, No. 96-593-CR-Moore (S.D. Fla. Jan. 15, 1997) Mar 1997

United States v. $46,588.00 in United States Currency, 103 F.3d 902 (9th Cir. 1996) Jan 1997

Collateral Estoppel

Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996) Feb 1997

Collection of Judgment

United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) Mar 1997

Constructive Trust

United States v. Ribadeneira, ___ F.3d ___, 1997 WL 33524 (2d Cir. Jan. 30, 1997) Mar 1997

Cost Bond

Arango v. U.S. Dept. of the Treasury, 1997 WL 306993 (11th Cir. June 24, 1997) July 1997

Criminal Forfeiture

- *United States v. Gaviria*, ___F.3d___, 1997 WL 351217 (D.C. Cir. June 27, 1997) Aug 1997
- *United States v. Siegal*, Crim. No. 97-10002 (PBS) (D. Mass. June 24, 1997) Aug 1997

United States v. White, ___F.3d ___, 1997 WL 338602 (1st Cir. June 24, 1997) July 1997

United States v. Rosario, 110 F.3d 293 (2d Cir. 1997) May 1997

United States v. Ruedlinger, 1997 WL 161960 (D. Kan. Mar. 7, 1997) (unpublished) May 1997

United States v. Ramsey, 1997 U.S. App. Lexis 565 (7th Cir. Jan. 9, 1997) (unpublished) Mar 1997

United States v. McHan, 101 F.3d 1027 (4th Cir. 1996) Jan 1997

United States v. Rogers, 102 F.3d 641 (1st Cir. 1996) Jan 1997

Cross Claims

United States v. All Right . . . in the Contents of . . . Accounts at Morgan Guaranty Trust Co., 1996 WL 695671 (S.D.N.Y. Dec. 5, 1996) Jan 1997

Default Judgment

United States v. Property Identified as 25 Pieces of Assorted Jewelry, 1996 WL 724938 (D.D.C. Dec. 4, 1996) — Feb 1997

Delay in Filing Complaint

United States v. $274,481, Civ. 94-2128CCC (D.P.R. May 29, 1997) — July 1997

United States v. Computer Equipment Valued at $819,026 Seized from Susco International, 1996 WL 684431 (E.D.N.Y. Nov. 20, 1996) — Jan 1997

Discovery

- *United States v. Lot Numbered 718,* 1997 WL 280603 (D.D.C. May 16, 1997) (unpublished) — Aug 1997

United States v. Seven Pieces of Assorted Jewelry, No. 96-6628-Civ-Ryskamp (S.D. Fla. Apr. 10, 1997) (unpublished) — June 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), 961 F. Supp. 282 (D.D.C. 1997) — May 1997

United States v. One Tract of Real Property . . . Little River Township, 1997 WL 71719 (4th Cir. Feb. 20, 1997) (unpublished) — Apr 1997

Disposition of Property

United States v. Kramer, 957 F. Supp. 223 (S.D. Fla. 1997) — May 1997

Double Jeopardy

United States v. Amlani, 111 F.3d 705 (9th Cir. 1997) — May 1997

United States v. Jones, 111 F.3d 597 (8th Cir. 1997) — May 1997

United States v. Perez, 110 F.3d 265 (5th Cir. 1997) — May 1997

United States v. Vaughn, 111 F.3d 610 (8th Cir. 1997) — May 1997

United States v. Emmons, 107 F.3d 762 (10th Cir. 1997) — Mar 1997

Due Process

United States v. $274,481, Civ. 94-2128CCC (D.P.R. May 29, 1997) — July 1997

United States v. $49,576.00 U.S. Currency, 116 F.3d 425 (9th Cir. 1997) — July 1997

United States v. One Samsung Computer, 1997 WL 104974 (E.D. La. March 7, 1997) (unpublished) — Apr 1997

Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996) — Feb 1997

United States v. Computer Equipment Valued at $819,026 Seized from Susco International, 1996 WL 684431 (E.D.N.Y. Nov. 20, 1996) — Jan 1997

EAJA Fees

United States v. Eleven Vehicles, ___ F. Supp. ___, 1997 WL 324441 (E.D. Pa. May 30, 1997) — July 1997

Town of Sanford v. United States, ___ F. Supp. ___, 1997 WL 205825 (D. Me. Apr. 8, 1997) — June 1997

Creative Electric, Inc, v. United States, 1997 WL 109210 (N.D.N.Y. Mar. 28, 1997) (unpublished) — May 1997

United States v. $5,000 in U.S. Currency, 1997 U.S. App. LEXIS 280 (6th Cir. Jan. 3, 1997) (unpublished) — Mar 1997

Excessive Fines

- *United States v. Hosep Krikor Bajakajian,* No. 96-1487, Government's brief filed July 14, 1997. — Aug 1997
- *United States v. Real Property Titled in the Names of Kang and Lee,* ___F.3d___, 1997 WL 393084 (9th Cir. July 15, 1997) — Aug 1997

United States v. Bajakajian, No. 96-1487, ___S. Ct. ___, 1997 WL134399 (May 27, 1997) (granting certiorari) — June 1997

United States v. Toyfoya, No. CR-93-0505-EFL (N.D. Cal. Mar. 27, 1997) (unpublished) — June 1997

United States v. One Parcel of Real Estate at 10380 S. W. 28th Street, (S.D. Fla. 1997) (unpublished) — May 1997

Ezennwa v. United States, 1997 WL 63318 (E.D.N.Y. 1997) (unpublished) — Apr 1997

United States v. Alexander, 100 F.3d 853 (8th Cir. 1997) — Apr 1997

United States v. Property Identified as 1813 15th Street, N.W., 956 F. Supp. 1029 (D.D.C. 1997) — Apr 1997

United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) — Apr 1997

United States v. Delgado, No. 96-593-CR-Moore (S.D. Fla. Jan. 15, 1997) — Mar 1997

United States v. One Parcel of Property (Edmonson),106 F.3d 336 (10th Cir. 1997) Mar 1997

United States v. One 1988 Prevost Liberty Motor Home,
952 F. Supp. 1180 (S.D. Tex. 1996) Mar 1997

United States v. Property Identified as 25 Pieces of Assorted Jewelry,
1996 WL 724938 (D.D.C. Dec. 4, 1996) Feb 1997

King v. United States, 949 F. Supp. 787 (E.D. Wash. 1996) Jan 1997

United States v. Deninno, 103 F.3d 1027 (10th Cir. 1996) Jan 1997

United States v. 5307 West 90th Street, 955 F. Supp. 881 (N.D. Ill. 1996) Jan 1997

United States v. $350,000, 1996 WL 706821 (E.D.N.Y. Dec. 6, 1996) Jan 1997

Facilitating Property

United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) Apr 1997

United States v. Rogers, 102 F.3d 641 (1st Cir. 1996) Jan 1997

Fair Market Value

United States v. One Parcel Property Located at 414 Kings Highway,
No. 5:91-CV-158 (D. Conn. July 3, 1996) Jan 1997

False Statements

United States v. Tracy, 108 F.3d (2d Cir. 1997) Apr 1997

Federal Debt Collections Procedures Act

United States v. Murray, 963 F. Supp. 52 (D. Mass. 1997) May 1997

Firearms

United States v. Indelicato, 964 F. Supp. 555 (D. Mass. 1997) July 1997

Gambling

- *United States v. Real Property Titled in the Names of Kang and Lee*,
___F.3d___, 1997 WL 393084 (9th Cir. July 15, 1997) Aug 1997

Good Hearing

United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D. Tex. 1996) — Mar 1997

Good Violation

United States v. All Assets and Equipment of West Side building Corp., 1997 WL 187319 (N.D. Ill. Apr. 10, 1997) (unpublished) — June 1997

United States v. 408 Peyton Road, S.W., ___F.3d___, 1997 WL 212209 (11th Cir. May 15, 1997) — June 1997

Cameron v. Drug Enforcement Administration, 995 F. Supp. 92 (D.P.R. 1997) — Apr 1997

United States v. All Assets and Epuipment of West Side Building Corp., 1997 U.S. Dist. LEXIS 150 (N.D. Ill. Jan. 9, 1997) — Mar 1997

United States v. Marsh, 105 F.3d 927 (4th Cir. 1997) — Mar 1997

United States v. Real Property Located at Incline Village, CV-N-90-0130-ECR (D. Nev. Jan. 30, 1997) — Mar 1997

Habeas Corpus

Hines v. LeStrange, 1997 WL 37543 (N.D. Cal. 1997) — Mar 1997

Hearsay

United States v. $271,070.00 in United States Currency, 1997 WL 106307 (N.D. Ill. Feb. 12, 1997) — Apr 1997

Illegal Seizure

United States v. Rogers, 102 F.3d 641 (1st Cir. 1996) — Jan 1997

Immunity

- *Conrod v. Davis*, ___F.3d___, 1997 WL 398569 (8th Cir. July 17, 1997) — Aug 1997

Innocent Owner

Town of Sanford v. United States,___ F. Supp. ___, 1997 WL 205825 (D. Me. Apr. 8, 1997) — June 1997

United States v. One Tract of Real Property . . . Little River Township, 1997 WL 71719 (4th Cir. Feb. 20, 1997) (unpublished) — Apr 1997

United States v. Property Identified as 1813 15th Street, N.W.,
956 F. Supp. 1029 (D.D.C. 1997) — Apr 1997

United States v. One 1988 Prevost Liberty Motor Home,
952 F. Supp. 1180 (S.D. Tex. 1996) — Mar 1997

United States v. One Parcel Property at Lot 22, 1996 WL 695404
(D. Kan. Nov. 15, 1996) — Jan 1997

Interest

United States v. $133,735.30, Civil No. 93-1423-JO (D. Or. Jan 13, 1997) — Feb 1997

In Rem Jurisdiction

United States v. $46,588.00 in United States Currency, 103 F.3d 902
(9th Cir. 1996) — Jan 1997

Interlocutory Sale

United States v. One Parcel Property Located at 414 Kings Highway,
No. 5:91-CV-158 (D. Conn. July 3, 1996) — Jan 1997

Joint and Several Liability

- *United States v. Gaviria*, ___F.3d___, 1997 WL 351217 (D.C. Cir. June 27, 1997) — Aug 1997

United States v. McHan, 101 F.3d 1027 (4th Cir. 1996) — Jan 1997

Jurisdiction

Edney v. City of Montgomery, ___ F. Supp. ___, 1997 WL 120020
(M.D. Ala. Feb. 28, 1997) — Apr 1997

Laches

- *United States v. Marolf*, ___F. Supp. ___, 1997 WL 400804 (C.D. Cal. July 11, 1997) — Aug 1997

Vance v. United States, 965 F. Supp. 944 (E.D. Mich. 1997) — May 1997

Ikelionwu v. United States, No. 95-CV-4622 (EHN) (S.D.N.Y. Jan. 3, 1997) — Feb 1997

Legitimate Source Defense

United States v. $15,200 in United States Currency, No. EV 96-60-C R\H (S.D. Ind. Dec. 31, 1996) (unpublished) — Mar 1997

Lis Pendens

United States v. Scardino, 956 F. Supp. 774 (N.D. Ill. 1997) — Feb 1997

United States v. St. Pierre, 950 F. Supp. 334 (M.D. Fla. 1996) — Feb 1997

Marshals Service

United States v. Matthews, 106 F.3d 1092 (2d Cir. 1997) — Mar 1997

Marital Privilege

United States v. Yerardi, Crim. No. 93-10278 (REK) (D. Mass. May 5, 1997) (unpublished) — June 1997

Money Laundering

- *United States v. All Funds on Deposit...Perusa, Inc.*, CV-96-3081 (E.D.N.Y. June 18, 1997) — Aug 1997

United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) — Apr 1997

United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D. Tex. 1996) — Mar 1997

Motion for Return of Property

Stasio v. United States, 1997 WL 36981 (E.D.N.Y. Jan. 17, 1997) — Mar 1997

Motion to Amend Complaint

United States v. U.S. Currency in the Amount of $146,800, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997) — July 1997

Motion to Dismiss

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), 961 F. Supp. 282 (D.D.C. 1997) — May 1997

Motion to Suppress

- *United States v. Lot Numbered 718,* 1997 WL 280603 (D.D.C. May 16, 1997) (unpublished) — Aug 1997

Notice

- *United States v. Marolf,* ___F. Supp. ___, 1997 WL 400804 (C.D. Cal. July 11, 1997) — Aug 1997

Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. May 23, 1997) (unpublished) — July1997

Quinones v. U.S. Dept. of Justice, DEA, 1997 WL 337242 (N.D. Ill. Jun. 17, 1997) — July 1997

Owens v. United States, 1997 WL 177863 (E.D.N.Y. Apr. 3, 1997) (unpublished) — June 1997

Town of Sanford v. United States,___ F. Supp. ___, 1997 WL 205825 (D. Me. Apr. 8, 1997) — June 1997

Boero v. Drug Enforcement Administration, 111 F.3d 301 (2d Cir. 1997) — May 1997

Powell v. DEA, 1997 WL 160683 (S.D.N.Y. Apr. 7, 1996) (unpublished) — May 1997

United States v. Cupples, 112 F.3d 318 (8th Cir. 1997) — May 1997

United States v. One Samsung Computer, 1997 WL 104974 (E.D. La. March 7, 1997) (unpublished) — Apr 1997

United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997) — Apr 1997

Bye v. United States, 105 F.3d 856 (2d Cir. 1997) — Mar 1997

Olivo v. United States, 1997 WL 23181 (S.D.N.Y. Jan. 22, 1997) (unpublished) — Mar 1997

Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996) — Feb 1997

Vasquez v. United States, 1996 WL 692001 (S.D.N.Y. Dec. 3, 1996) — Jan 1997

Particularity

United States v. $59,074.00 in U.S. Currency, 959 F. Supp. 243 (D.N.J. 1997) — May 1997

Parallel Civil Forfeiture

United States v. DeCato, 1997 WL 136339 (D. Mass. Feb. 20, 1997) (unpublished) — May 1997

United States v. Jones, 111 F.3d 597 (8th Cir. 1997) — May 1997

Personal Jurisdiction

United States v. All Right ... in the Contents of ... Accounts at Morgan Guaranty Trust Co., 1997 WL 220309 (S.D.N.Y. May 1, 1997) (unpublished) — June 1997

Plea Agreements

United States v. Walker, 112 F.3d 163 (4th Cir. 1997) — June 1997

Post-conviction Discovery

United States v. Yerardi, Crim. No. 93-10278 (REK) (D. Mass. May 5, 1997) (unpublished) — June 1997

Post and Walk

United States v. 408 Peyton Road, S.W., ___ F.3d___, 1997 WL 212209 (11th Cir. May 15, 1997) — June 1997

United States v. Real Property at 286 New Mexico Lane, 1996 WL 732561 (M.D. Fla. Dec. 19, 1996) — Jan 1997

Pre-Trial Restraint

- *United States v. Siegal*, Crim. No. 97-10002 (PBS) (D. Mass. June 24, 1997) — Aug 1997

United States v. St. Pierre, 950 F. Supp. 334 (M.D. Fla. 1996) — Feb 1997

Probable Cause

United States v. $88,653.00 in U.S. Currency, 1997 WL 312546 (9th Cir. Jun. 3, 1997) — July 1997

United States v. $49,576.00 U.S. Currency, 116 F.3d 425 (9th Cir. 1997) — July 1997

United States v. U.S. Currency in t he Amount of $146,800, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997) — July 1997

United States v. Washington, 1997 WL 198046 (D. Kan. Jan. 17, 1997) (unpublished) — June 1997

United States v. Property Identified as 1813 15th Street, N.W., 956 F. Supp. 1029 (D.D.C. 1997) — Apr 1997

United States v. $271,070.00 in United States Currency, 1997 WL 106307 (N.D. Ill. Feb. 12, 1997) — Apr 1997

United States v. One Lot of U.S. Currency ($36,634), 103 F.3d 1048 (1st Cir. 1997) — Feb 1997

United States v. Funds in the Amount of $9800, 952 F. Supp. 1254 (N.D. Ill. Dec. 23, 1996) — Feb 1997

United States v. Property Identified as 25 Pieces of Assorted Jewelry, 1996 WL 724938 (D.D.C. Dec. 4, 1996) — Feb 1997

United States v. Funds in the Amount of Twelve Thousand Dollars ($12,000.00) et al., 1996 WL 717454 (N.D. Ill. Dec. 9, 1996) — Jan 1997

United States v. $8,800 in U.S. Currency, 945 F. Supp. 521 (W.D.N.Y. 1996) — Jan 1997

Proceeds

United States v. McHan, 101 F.3d 1027 (4th Cir. 1996) — Jan 1997

Real Property

United States v. Real Property Described in Deeds, ___ F. Supp. ___, 1997 WL 222289 (W.D.N.C. Feb. 20, 1997) — June 1997

Relation Back Doctrine

Town of Sanford v. United States, ___ F. Supp. ___, 1997 WL 205825 (D. Me. Apr. 8, 1997) — June 1997

United State v. Scardino, 956 F. Supp. 774 (N.D. Ill. 1997) — Feb 1997

Remission Petitions

- *Burke v. United States Department of Justice*, ___F. Supp. ___, 1997 WL 362502 (M.D. Ala. June 9, 1997) — Aug 1997

Burke v. United States, No. 95-D-642-N (M.D. Ala. Apr. 9, 1997) (unpublished) — May 1997

Res Judicata

United States v. DeCato, 1997 WL 136339 (D. Mass. Feb. 20, 1997) (unpublished) — May 1997

United States v. Murray, 1997 WL 136452 (D. Mass. 1997) (unpublished) — May 1997

Cameron v. Drug Enforcement Administration, 995 F. Supp. 92 (D.P.R. 1997) — Apr 1997

Restitution

- *United States v. Pelullo,* 961 F. Supp. 736, (D.N.J. 1997) — Aug 1997

United States v. $350,000, 1996 WL 706821 (E.D.N.Y. Dec. 6, 1996) — Jan 1997

Restraining Orders

United States v. Bellomo, 954 F. Supp. 630 (S.D.N.Y. 1997) — Feb 1997

United States v. Gigante, 948 F. Supp. 279 (S.D.N.Y. 1996) — Jan 1997

RICO

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Feb. 13, 1997) — Mar 1997

United States v. Bellomo, 954 F. Supp. 630 (S.D.N.Y. 1997) — Feb 1997

Right of Set-off

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Security Pacific International Bank), ___ F. Supp. ___ 1997 WL _____ (D.D.C. Jan. 17, 1997) — Feb 1997

Right to Counsel

United States v. St. Pierre, 950 F. Supp. 334 (M.D. Fla. 1996) — Feb 1997

United States v. Deninno, 103 F.3d 82 (10th Cir. 1996) — Jan 1997

Rule 41(e)

In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards, 1997 WL 327129 (E.D. La. June 12, 1997) (unpublished) — July 1997

United States v. U.S. Currency in the Amount of $146,800, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997) — July 1997

United States v. $12,854.00 in U.S. Currency, 1997 WL 335805 (D.D.C. Jun. 5, 1997) — July 1997

Ademoye v. United States, 1997 WL 218212 (E.D.N.Y. Apr. 11, 1997) (unpublished) — June 1997

United States v. $146,800, 96-CV-4882 (E.D.N.Y. Apr. 28, 1997) (unpublished) — June 1997

Corinthian v. United States, CV-96-0945 (CPS) (E.D.N.Y. Mar. 13, 1997) (unpublished) May 1997

Vance v. United States, 965 F. Supp. 944 (E.D. Mich. 1997) May 1997

United States v. Lamplugh, 956 F. Supp. 1204 (M.D. Pa. 1997) Apr 1997

United States v. Solis , 108 F.3d 722 (7th Cir. 1997) Apr 1997

Rule 60(b)

United States v. Ken International Co., Ltd.,1997 WL 229114 (9th Cir. May 2, 1997) June 1997

Garcia v. United States, Civil No. 96-0656-R; Crim. No. 901274-R (S.D. Cal. Mar. 19, 1997) (unpublished) May 1997

United States v. One Samsung Computer, 1997 WL 104974 (E.D. La. March 7, 1997) (unpublished) Apr 1997

United States v. Property Identified as 25 Pieces of Assorted Jewelry, 1996 WL 724938 (D.D.C. Dec. 4, 1996) Feb 1997

United States v. $350,000, 1996 WL 706821 (E.D.N.Y. Dec. 6, 1996) Jan 1997

Section 888

United States v. One 1996 Toyota Camry Sedan, 963 F. Supp. 903 (C.D. Cal. 1997) July 1997

Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996) Feb 1997

United States v. A 1966 Ford Mustang, 945 F. Supp. 149 (S.D. Ohio 1996) Feb 1997

Section 1983

- *Conrod v. Davis*, ___F.3d___, 1997 WL 398569 (8th Cir. July 17, 1997) Aug 1997

Standing

- *United States v. All Funds on Deposit...Perusa, Inc.*, CV-96-3081 (E.D.N.Y. June 18, 1997) Aug 1997

United States v. Premises and Real Property . . . 500 Delaware Street, 113 F.3d 310 (2d Cir. 1997) July 1997

United States v. Ken International Co., Ltd.,1997 WL 229114 (9th Cir. May 2, 1997) June 1997

United States v. Real Property Described in Deeds, ___ F. Supp. ___, 1997 WL 222289 (W.D.N.C. Feb. 20, 1997) — June 1997

United States v. 47 West 644 Route 38,___ F. Supp. ___, 1997 WL 208373 (N.D. Ill. Apr. 25, 1997) — June 1997

United States v. $271,070.00 in United States Currency, 1997 WL 94722 (N.D. Ill. Mar. 3, 1997) (unpublished) — Apr 1997

Olivo v. United States, 1997 WL 23181 (S.D.N.Y. Jan. 22, 1997) (unpublished) — Mar 1997

United States v. All Funds on Deposit ... in the Name of Kahn, 955 F. Supp. 23 (E.D.N.Y. 1997) — Mar 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank), ___ F. Supp. ___, 1997 WL _____ (D.D.C. Feb. 13, 1997) — Mar 1997

United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D. Tex. 1996) — Mar 1997

United States v. Ribadeneira, 105 F.3d 833 (2d Cir. 1997) — Mar 1997

Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996) — Feb 1997

Statute of Limitations

- *United States v. Marolf*, ___F. Supp. ___, 1997 WL 400804 (C.D. Cal. July 11, 1997) — Aug 1997
- *United States v. Real Property Titled in the Names of Kang and Lee*, ___F.3d___, 1997 WL 393084 (9th Cir. July 15, 1997) — Aug 1997

Corinthian v. United States, CV-96-0945 (CPS) (E.D.N.Y. Mar. 13, 1997) (unpublished) — May 1997

Vance v. United States, 965 F. Supp. 944 (E.D. Mich. 1997) — May 1997

Vasquez v. United States, 1996 WL 692001 (S.D.N.Y. Dec. 3, 1997) — Jan 1997

Subject Matter Jurisdiction

Ademoye v. United States, 1997 WL 218212 (E.D.N.Y. Apr. 11, 1997) (unpublished) — June 1997

Ezennwa v. United States, 1997 WL 63318 (E.D.N.Y. 1997) (unpublished) — Apr 1997

Substantial Connection

United States v. Real Property Described in Deeds, ___ F. Supp. ___, 1997 WL 222289 (W.D.N.C. Feb. 20, 1997) — June 1997

United States v. Scardino, 956 F. Supp. 774 (N.D. Ill. 1997) Feb 1997

United States v. Gigante, 948 F. Supp. 279 (S.D.N.Y. 1996) Jan 1997

Summary Judgment

United States v. 47 West 644 Route 38, ___ F. Supp. ___, 1997 WL 208373 (N.D. Ill. Apr. 25, 1997) June 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), 961 F. Supp. 282 1997 (D.D.C. 1997) May 1997

United States v. Property Identified as 1813 15th Street, N.W., 956 F. Supp. 1029 (D.D.C. 1997) Apr 1997

United States v. $271,070.00 in United States Currency, 1997 WL 106307 (N.D. Ill. Feb. 12, 1997) Apr 1997

Suppresion

United States v. 47 West 644 Route 38,___ F. Supp. ___, 1997 WL 208373 (N.D. Ill. Apr. 25, 1997) June 1997

Taxes

King v. United States, ___ F. Supp. ___ No. CS-95-0331-JLQ (E.D. Wash. July 2, 1996) Jan 1997

Traceable Property

United States v. Real Property Described in Deeds, ___ F. Supp. ___, 1997 WL 222289 (W.D.N.C. Feb. 20, 1997) June 1997

Untimely Claim

Garcia v. United States, Civil No. 96-0656-R; Crim.No.901274-R (S.D. Cal.1997) May 1997

Warrantless Seizure

United States v. Washington,1997 WL 198046 (D. Kan. Jan. 17, 1997) (unpublished) June 1997

Alphabetical Index

The following is an alphabetical listing of cases that have appeared in the *Quick Release* during 1997. The issue in which the case summary was published follows the cite.

In re $844,520.00 in United States Currency, No. 95-0674-CV-W-4 (W.D. Mo. Feb. 27, 1997) (unpublished)	May 1997
King v. United States, 949 F. Supp. 787 (E.D. Wash. 1996)	Jan 1997
Olivo v. United States, 1997 WL 23181 (S.D.N.Y. Jan. 22, 1997) (unpublished)	Mar 1997
Owens v. United States, 1997 WL 177863 (E.D.N.Y. Apr. 3, 1997) (unpublished)	June 1997
Powell v. DEA, 1997 WL 160683 (S.D.N.Y. Apr. 7, 1996) (unpublished)	May 1997
Quinones v. U.S. Dept. of Justice, DEA, 1997 WL 337242 (N.D. Ill. Jun. 17, 1997)	July 1997
Stasio v. United States, 1997 WL 36981 (E.D.N.Y. Jan. 17, 1997)	Mar 1997
Scott v. United States, 1996 WL 748428 (D.D.C. Dec. 19, 1996)	Feb 1997
Town of Sanford v. United States, 961 F. Supp. 16 (D. Me. 1997)	June 1997
United States v. A 1966 Ford Mustang, 945 F. Supp. 149 (S.D. Ohio 1996)	Feb 1997
United States v. Alequin, Crim. No. 1:CR-95-014 (M.D. Pa. June 3, 1997) (unpublished)	Aug 1997
United States v. Alexander, 100 F.3d 853 (8th Cir. 1997)	Apr 1997
United States v. All Assets and Epuipment of West Side Building Corp., 1997 U.S. Dist. LEXIS 150 (N.D. Ill. Jan. 9, 1997)	Mar 1997
United States v. All Funds on Deposit ... in the Name of Kahn, 955 F. Supp. 23 (E.D.N.Y. 1997)	Mar 1997
United States v. All Funds on Deposit...Perusa, Inc., CV-96-3081 (E.D.N.Y. June 18, 1997)	Aug 1997
United States v. All Right...in the Contents of ...Accounts at Morgan Guaranty Trust Co., 1997 WL 220309 (S.D.N.Y. May 1, 1997) (unpublished)	June 1997
United States v. All Right . . . in the Contents of . . . Accounts at Morgan Guaranty Trust Co., 1996 WL 695671 (S.D.N.Y. Dec. 5, 1996)	Jan 1997
United States v. Amlani, 111 F.3d 705 (9th Cir. 1997)	May 1997
United States v. Bajakajian, 117 S. Ct. 1841 (May 27, 1997) (granting certiorari)	June 1997
United States v. BCCI Holdings (Luxembourg) S.A.(Petition of American Express Bank II), ___ F. Supp. ___, 1997 WL 202891 (D.D.C. Apr. 22, 1997)	May 1997
United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank), 961 F. Supp. 282 (D.D.C. 1997)	Mar 1997

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez), 961 F. Supp. 282 (D.D.C. 1997)	May 1997
United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Security Pacific International Bank), ___ F. Supp. ___, 1997 WL _____(D.D.C. Jan. 17, 1997)	Feb 1997
United States v. Bellomo, 954 F. Supp. 630 (S.D.N.Y. 1997)	Feb 1997
United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997)	Mar 1997
United States v. Computer Equipment Valued at $819,026 Seized from Susco International, 1996 WL 684431 (E.D.N.Y. Nov. 20, 1996)	Jan 1997
United States v. Cupples, 112 F.3d 318 (8th Cir. 1997)	May 1997
United States v. Daily, ___F. Supp. ___, 1997 WL 371141 (N.D. III June 27, 1997)	Aug 1997
United States v. DeCato, 1997 WL 136339 (D. Mass. Feb. 20, 1997) (unpublished)	May 1997
United States v. Delgado, No. 96-593-CR-Moore (S.D. Fla. Jan. 15, 1997)	Mar 1997
United States v. Deninno, 103 F.3d 82 (10th Cir. 1996)	Jan 1997
United States v. Eleven Vehicles, ___ F. Supp. ___, 1997 WL 324441 (E.D. Pa. May 30, 1997)	July 1997
United States v. Emmons, 107 F.3d 762 (10th Cir. 1997)	Mar 1997
United States v. Funds in the Amount of Twelve Thousand Dollars ($12,000.00) et al., 1996 WL 717454 (N.D. Ill. Dec. 9, 1996)	Jan 1997
United States v. Gigante, 948 F. Supp. 1048 (S.D.N.Y. 1996)	Jan 1997
United States v. Gaviria, ___F.3d___, 1997 WL 351217 (D.C. Cir. Jun. 27, 1997)	Aug 1997
United States v. Hosep Krikor Bajakajian, No. 96-1487 Government's brief filed July 14, 1997.	Aug 1997
United States v. Indelicato, 964 F. Supp. 555, 1997 WL 278000 (D. Mass. May 16, 1997)	July 1997
United States v. Jones, 111 F.3d 597 (8th Cir. 1997)	May 1997
United States v. Ken International Co., Ltd.,1997 WL 229114 (9th Cir. May 2, 1997)	June 1997
United States v. Kramer, 957 F. Supp. 223 (S.D. Fla. 1997)	May 1997
United States v. Lamplugh, 956 F. Supp. 1204 (M.D. Pa. 1997)	Apr 1997

United States v. Lot Numbered 718, 1997 WL 280603 (D.D.C. May 16, 1997) (unpublished)	Aug 1997
United States v. Marolf, ___ F. Supp. ___, 1997 WL 400804 (C.D. Cal. July 11, 1997)	Aug 1997
United States v. Marsh, 105 F. 3d 927 (4th Cir. 1997)	Mar 1997
United States v. Matthews, 106 F.3d 1092 (2d Cir. 1997)	Mar 1997
United States v. McHan, 101 F.3d 1027 (4th Cir. 1996)	Jan 1997
United States v. Murray, 1997 WL 136452 (D. Mass. 1997) (unpublished)	May 1997
United States v. One Beechcraft King Air 300 Aircraft, 107 F. 3d 829 (11th Cir. 1997)	Apr 1997
United States v. One Hundred Twenty Thousand Seven Hundred Fifty One Dollars ($120,751.00), 102 F.3d 342 1996 WL 699761 (8th Cir. 1996)	Jan 1997
United States v. One Lot of U.S. Currency ($36,634), 103 F.3d 1048 (1st Cir. 1997)	Feb 1997
United States v. One Parcel of Property (Edmonson), 106 F.3d 336 (10th Cir. 1997)	Mar 1997
United States v. One Parcel Property at Lot 22, 1996 WL 695404 (D. Kan. Nov. 15, 1996)	Jan 1997
United States v. One Parcel of Real Estate at 10380 S. W. 28th Street, (S.D. Fla. Mar, 18, 1997) (unpublished)	May 1997
United States v. One Parcel Property Located at 414 Kings Highway, No. 5:91-CV-158 (D. Conn. July 3, 1996)	Jan 1997
United States v. One Tract of Real Property . . . Little River Township, 1997 WL 71719 (4th Cir. Feb. 20, 1997) (unpublished)	Apr 1997
United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D. Tex. Dec. 3, 1996)	Mar 1997
United States v. One 1996 Toyota Camry Sedan, 963 F. Supp. 903 (C.D. Cal. 1997)	July 1997
United States v. One SamsungComputer, 1997 WL 104974 (E.D. La. Mar. 7, 1997) (unpublished)	Apr 1997
United States v. Pelullo, 961 F. Supp. 736 (D.N.J. 1997)	Aug 1997
United States v. Perez, 110 F.3d 265 (5th Cir. 1997)	May 1997
United States v. Premises and Real Property . . . 500 Delaware Street, 113 F.3d 310 (2nd Cir. 1997)	July 1997

United States v. Property Identified as 25 Pieces of Assorted Jewelry, 1996 WL 724938 (D.D.C. Dec. 4, 1996)	Feb 1997
United States v. Property Identified as 1813 15th Street, N.W., 956 F. Supp. 1029 (D.D.C. 1997)	Apr 1997
United States v. Ramsey, 1997 U.S. App. Lexis 565 (7th Cir. Jan. 9, 1997) (unpublished)	Mar 1997
United States v. Real Property Described in Deeds, 962 F. Supp. 734 (W.D.N.C. 1997)	June 1997
United States v. Real Property Located at Incline Village, CV-N-90-0130-ECR (D. Nev. Jan. 30, 1997)	Mar 1997
United States v. Real Property at 286 New Mexico Lane, 1996 WL 732561 (M.D. Fla. Dec. 19, 1996)	Jan 1997
United States v. Real Property Titled in the Names of Kang and Lee, ___ F.3d___, 1997 WL 393084 (9th Cir. July 15, 1997)	Aug 1997
United States v. Ribadeneira, 105 F.3d 833 (2d Cir. 1997)	Mar 1997
United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997)	Apr 1997
United States v. Rogers, 102 F.3d 641 (1st Cir. 1996)	Jan 1997
United States v. Rosario, 111 F.3d 293 (2d Cir. 1997)	May 1997
United States v. Ruedlinger, 1997 WL 161960 (D. Kan. Mar. 7, 1997) (unpublished)	May 1997
United States v. Rutgard,1997 WL 174102 (9th Cir. Apr. 9, 1997) (unpublished)	June 1997
United States v. Scardino, 956 F. Supp. 774 (N.D. Ill. 1997)	Feb 1997
United States v. Siegal, Crim No. 97-10002 (PBS) (D. Mass. June 24, 1997)	Aug 1997
United States v. Seven Pieces of Assorted Jewelry, No. 96-6628-Civ-Ryskamp (S.D. Fla. Apr. 10, 1997) (unpublished)	June 1997
United States v. Solis , 108 F.3d 722 (7th Cir. 1997)	Apr 1997
United States v. St. Pierre, 950 F. Supp. 334 (M.D. Fla. 1996)	Feb 1997
United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997)	Apr 1997
United States v. Toyfoya, No. CR-93-0505-EFL (N.D. Cal. Mar. 27, 1997) (unpublished)	June 1997
United States v. Tracy, 108 F.3d 473 (2d Cir. 1997)	Apr 1997
United States v. U.S. Currency in the Amount of $146,800, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997)	July 1997

United States v. Vaughn, 111 F.3d 610 (8th Cir. 1997)	May 1997
United States v. Walker,112 F.3d 163 (4th Cir. 1997)	June 1997
United States v. Washington,1997 WL 198046 (D. Kan. Jan. 17, 1997) (unpublished)	June 1997
United States v. White, ___F.3d ___, 1997 WL 338602 (1st Cir. June 24, 1997)	July 1997
United States v. Yerardi, Crim. No. 93-10278 (REK) (D. Mass. May 5, 1997) (unpublished)	June 1997
United States v. 47 West 644 Route 38, 962 F. Supp. 1081 (N.D. Ill. 1997)	June 1997
United States v. 408 Peyton Road, S.W., 112 F.3d 1106 (11th Cir. 1997)	June 1997
United States v. 5307 West 90th Street, 955 F. Supp. 881 (N.D. Ill. 1996)	Jan 1997
United States v. $5,000 in U.S. Currency, 1997 U.S. App. LEXIS 280 (6th Cir. Jan. 3, 1997) (unpublished)	Mar 1997
United States v. $8,800 in U.S. Currency, 945 F. Supp. 521 (W.D.N.Y. 1996)	Jan 1997
United States v. Funds in the Amount of $9,800, 952 F. Supp. 1254 (N.D. Ill. 1996)	Feb 1997
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